IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1925

No. [redacted] 51

THE BUCKEYE COAL AND RAILWAY COMPANY and THE SUNDAY CREEK COAL COMPANY,
Appellants,

vs.

THE HOCKING VALLEY RAILWAY COMPANY, CENTRAL UNION TRUST COMPANY OF NEW YORK and THE UNITED STATES OF AMERICA,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

BRIEF FOR APPELLEE, THE HOCKING VALLEY RAILWAY COMPANY.

JOHN F. WILSON,
Solicitor for Appellee, The Hocking Valley Railway Company.

JOHN F. WILSON,
A. C. REARICK,
PAUL SMITH,
of Counsel.

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INDEX.

LIST OF CASES CITED.

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THE BUCKEYE COAL AND RAILWAY COMPANY and THE SUNDAY CREEK COAL COMPANY,

Appellants,

vs.

THE HOCKING VALLEY RAILWAY COMPANY, CENTRAL UNION TRUST COMPANY OF NEW YORK and THE UNITED STATES OF AMERICA,

Appellees.

Appeal From the District Court of the United States for the Southern District of Ohio, Eastern Division.

BRIEF FOR APPELLEE, THE HOCKING VALLEY RAILWAY COMPANY.

STATEMENT.

The present appeal is taken by appellants from an order of the United States District Court for the Southern District of Ohio, Eastern Division, dismissing a peti-

tion filed by appellants by leave of said Court in a proceeding theretofore pending in said Court under the title *United States of America* v. *Lake Shore & Michigan Southern Railway Company, et al.*, In Equity, No. 1584. The material facts are succinctly stated in the opinion of the Court below, filed January 18, 1924 (R., 109-113):

> "In the year 1912 the United States began suit in equity herein against six railroad companies and three coal companies, named in the margin hereof,[1] to dissolve a combination alleged to violate the Sherman anti-trust act (July 2, 1890, c. 647, 26 Stat. 209). Our decree of March 14, 1914, declared the combination to be in violation of the Act, and ordered dissolution by the sale of the railway companies' interests in the stock of the Sunday Creek Company, the disposition of stock in the Kanawha & Michigan Railway Company, and otherwise, including the enjoining of the Lake Shore & Michigan Southern, the Toledo & Ohio Central, the Hocking Valley and the Chesapeake & Ohio Railroad Companies from owning or controlling any stock in the Sunday Creek Company, or any interest in any of the coal properties in which that company is interested. Jurisdiction of the cause was expressly retained by the decree for the purpose of making such other and further orders and decrees as might be necessary to the due execution of the decree of 1914, and the complete dissolution of the combination condemned thereby. A detailed history of the case will be found in the opinion of this court upon which that decree was based. *United States* v. *L. S. & M. S. Ry. Co., et al.*, 203 Fed. 295. Under that retention, orders have been made from time to time, as deemed necessary, to effectuate dissolution.

[1] The Lake Shore & Michigan Southern Railway Company, the Chesapeake & Ohio Railway Company, the Hocking Valley Railway Company, the Toledo & Ohio Central Railway Company, the Kanawha & Michigan Railway Company, the Zanesville & Western Railway Company, The Sunday Creek Company, the Continental Coal Company, the Kanawha & Hocking Coal & Coke Company.

"When that decree was made the Hocking Valley Railway Company owned the entire of the capital stock of the Buckeye Coal & Railway Company (consisting of 2500 shares), all of which except five qualifying shares were held in pledge by the Central Trust Company, as trustee under the Hocking Valley Railway Company's First Consolidated Mortgage of 1899, by which mortgage the Buckeye Company had conveyed certain coal lands as further security for the payment of the Hocking Valley Railway Company's bonds secured by that mortgage, by the terms of which the Buckeye Company agreed to deliver, beginning July 1, 1900, yearly statements of coal mined, and to pay two cents per ton on such coal, to be used as a sinking fund for the purchase and cancellation to that extent of the mortgage bonds of the Hocking Valley Company.

"On May 19, 1916, upon application of the United States, this court made an order that the capital stock of the Buckeye Company be sold free and clear of the mortgage lien, and that the proceeds thereof be paid to the mortgage trustee to apply on the mortgage bonds (281 Fed. 1007). Under that order the Buckeye Company stock was sold to John S. Jones for $50,000 (in connection with the sale to him of the outstanding stock and bonds of the Ohio Land & Railway Company for $400,000), the sale being approved by this court upon presentation of the contract of sale between Jones, on the one part, and the Hocking Valley and Chesapeake & Ohio Railway Companies, on the other, and after taking the testimony of witnesses in open court relating to conformity of such sale to the order of May 19, 1916, the reasonableness of the price paid, and the satisfactory status of the purchaser—the mortgage trustee in connection therewith waiving its then pending appeal to the Supreme Court from the order of May 19, 1916. The contract between Jones and the railroad companies contained a recital of the inclusion in the Hocking Valley mortgage of the Buckeye real estate as such further security for the pay-

ment of the mortgage bonds, as well as the agreement in the mortgage for the payment by the Buckeye Company of the two cents per ton royalty on coal mined from its property so mortgaged. This recital was followed by express provision that the Hocking Valley Company should cause all the mortgaged property of that company to be first exhausted before any recourse under the mortgage to the property of the Buckeye Company; and that the Hocking Valley Company indemnify the Buckeye Company from any loss or damage to or payment by that company under the provisions of the mortgage 'save only said two cents per ton royalty above mentioned', and that nothing contained in said agreement was intended or should be construed in any-wise to limit, or affect or impair, the several covenants or obligations of the Buckeye Coal & Railway Company contained in said mortgage.

"After the purchase by Jones (who owned and owns all the Buckeye stock), the Buckeye Company failed and refused to carry out the provision for royalty payment. The mortgage trustee began suit in this court, in the year 1919, for the collection thereof, which suit is still pending and undetermined. In the same year the Buckeye Company instituted suit in a state common pleas court of Ohio to quiet its title against the claims of the mortgage trustee under the Hocking Valley mortgage. The Sunday Creek Coal Company of Ohio (not the original Sunday Creek Company), which had succeeded to the rights of the Buckeye Company in the lands, was made a party plaintiff. Upon final hearing upon issues joined, the Common Pleas Court dismissed the petition, adjudging that the mortgage 'and the covenants of the Buckeye Coal & Railway Company therein contained, are valid and binding obligations, and a good and valid lien upon the real property in said mortgage . . . described.' This decree was affirmed by the State Court of Appeals, the Supreme Court of Ohio declining to order the case certified for its

review. Thereupon the Buckeye Company and the Sunday Creek Coal Company filed their petitions in this Court, asserting that the situation created by the Hocking Valley trust mortgage, including especially the two cents per ton royalty provision, was in violation of the decree of dissolution previously made by this court; and asking that the demand or collection of the two cents per ton royalty be enjoined, the lands of the Buckeye Company released from the mortgage, and particularly from section 9 thereof (which contains the royalty provision), or that all interests of the railway company and the mortgage trustee in the Buckeye property be sold, or such other and appropriate order as will 'effectively carry out the purpose and effect' of the decree of 1914. After issues joined on the petition, and before decision thereon, the United States filed its supplemental petition herein, asking that the Buckeye coal lands be released from the lien of the Hocking Valley mortgage and the Buckeye Company discharged from its obligation to pay the two cents per ton royalty, upon payment by the Buckeye Company, or its successors in interest, to the Hocking Valley's mortgage trustee the reasonable value of the rights of the trustee, to be judicially ascertained; and on the ground that the situation created by such lien and royalty provision violates the anti-trust act and contravenes the original decree of dissolution made herein. It will be observed that the substantial difference between the petitions of the coal companies and the Government, respectively, is that the one asks such release without, the other upon, compensation to the mortgage trustee."

Matters of evidence referred to in the foregoing statement of facts appear in the record herein as follows:

Final Decree of March 14, 1914 (R., 165).

Material portions of First Consolidated Mortgage, March 1, 1899, The Hocking Valley Railway Company and The Buckeye Coal and Railway

Company to Central Trust Company of New York, Trustee (R., 215-220).

Order of May 19, 1916, directing sale of capital stock of The Buckeye Coal and Railway Company (R., 201-209).

Contract, October 7, 1916, for sale of The Buckeye Coal and Railway Company stock to John S. Jones (R., 57-62).

Order approving sale under contract of October 7, 1916, and order directing entry thereof (R., 212-213).

Admission of non-payment of royalties (R., 45).

Abstract of proceedings in Ohio State Courts (R., 246-247).

Upon the foregoing facts the Court below reached conclusions which were clearly and concisely stated in the opinion of the Court as follows (R., 113-115):

> "So far as concerns the petition of the Buckeye Company and the Sunday Creek Company, we think it clear that relief should be denied. While our jurisdiction generally to make such further orders and decrees as should be necessary to the due execution of our main decree, and the complete dissolution of the condemned combination, continued without abatement until such complete dissolution should be effected (*United States* v. *L. S. & M. S. Ry. Co., et al., supra*), there is perhaps substantial force in the thought that the order of this court of May 19, 1916, and the sale of the Buckeye Company's stock thereunder, exhausted the jurisdiction of this Court over the specific question whether the situation created by the lien of the Hocking Valley mortgage upon the Buckeye Company's lands, given to secure the Railroad's indebtedness, in connection with the tonnage royalty provision, was so far unlawful as to require its elimination. This court approved the sale of the stock to Jones with full knowledge of the fact situation now complained of, and pre-

sumably without its occurring to either court or Government's counsel that the situation created a substantial interference with the free competition aimed at by the original decree. The action taken might not improperly be thought to carry a tacit implication that the situation here presented was not then regarded open to criticism. But wholly apart from this consideration, and without passing upon its merits, we think relief forbidden by these further considerations: In the first place, assuming for the purposes of this opinion, that the petitioning coal companies have a legal interest in the elimination of the alleged unlawful feature, we see no reason to doubt that, as between the two original petitions and the Hocking Valley Company and its mortgage trustee, the decree of the state court binds both the Buckeye Company and the Sunday Creek Company as an adjudication of the complete validity of the mortgage as against the attacks now made upon it. Again, this is a proceeding in equity, and it is manifestly inequitable that either Jones or those standing in his right escape liability for a situation assumed by them, and, as we must find, then recognized as of binding force, and whose assumption seems fairly to have been part of the consideration paid by Jones for the Buckeye stock. In the situation presented, we think the petitioning coal companies cannot be heard to say that payment of the royalty, or the continuance of the mortgage lien upon the lands of the Buckeye Company, would violate the law. The fact that the Government did not answer or take issue upon the coal companies' petition cannot alter the result otherwise reached. The petition of the coal companies must be denied.

"The Government's supplemental petition rests upon a different foundation. It is conceded that the decision of the Supreme Court in the Reading case (*Continental Coal Co.* v. *United States*, 259 U. S. 156), announced about six years after the sale to Jones of the Buckeye stock, and shortly before the filing of the Government's supplemental petition before us, suggested to Government's

counsel the invalidity of the situation we are considering. It was eminently proper that the Government bring this situation before the Court, and afford opportunity for such action, if any, as should seem to be called for. But we are not impressed that the situation calls for the relief asked. Again passing without decision the question of the exhausting of jurisdiction of this court over the subject-matter of the supplemental petition, by the action had in the sale to Jones, it seems plain that even in view of the Reading decision the criticized situation is not so clearly improper, nor so substantial, as to justify the action which the Government now asks. Whatever theoretically potential interference with free competition might otherwise be created by the railroad-mortgage lien upon the Buckeye lands in connection with the royalty tonnage provision, we think such interference practically reduced to a minimum by the fact that by the contract between Jones and the railroad companies the railroad property must first be exhausted before resort can be had to the coal lands, in connection with the fact that no suggestion is made that the railroad property is not entirely adequate to meet the payment of the mortgage in full, and the payment of the mortgage puts an end to the royalty. Indeed, an affirmative inference, more or less strong, in favor of the adequacy of the railroad security seems fairly deducible from the record presented to us. We therefore think that it will be time enough to question the invalidity of the situation we are discussing when, if ever, it becomes acute.

"We are accordingly constrained to dismiss the Government's supplemental petition. The dismissal, however, will be without prejudice to its right to make further application for relief, when, if ever, the situation may be thought to justify it, in view of the considerations we have stated."

ABSTRACT OF ARGUMENT.

Our broad contentions are, briefly:

First that the appeal should be dismissed because the appellants have no standing to maintain it (Point I, *infra*, pp. 9-17).

Second that even if this Court concludes that appellants have standing to maintain the appeal, the order dismissing appellants' petition and herein appealed from should be affirmed:

(a) because the Court below was without jurisdiction to grant the relief prayed for by appellants (Point II, *infra*, pp. 27-43).

(b) because appellants' petition disclosed no violation of the Anti-Trust Act or of the lower Court's final Decree (Point III, *infra*, pp. 43-58).

(c) because to have granted appellants' prayer would have been manifestly inequitable (Point IV, *infra*, pp. 58-79).

ARGUMENT.

I.

The Appellants Are Without Standing to Prosecute an Appeal to This Court and the Appeal Should Therefore be Dismissed.

On April 20, 1925, the appellees, The Hocking Valley Railway Company and Central Union Trust Company of New York, submitted to this Court a motion to dismiss the appeal herein upon the ground above stated. It is possible that the Court may conclude to defer consideration of the questions raised by that motion until the hearing of the case upon the merits and we therefore file this brief and as the first point thereof here repeat, without substantial change, our argument heretofore presented in support of said motion to dismiss, as follows:

(a) THE APPELLANTS, HAVING INTERVENED SOLELY AS INFORMERS TO CALL ATTENTION TO AN ALLEGED PUBLIC INTEREST, ACQUIRED NO STATUS AS LITIGANTS.

The appellants sought to file their petition solely to protect an alleged public interest and in order to "effectively carry out the purpose and effect of the main decree" (Appellants' petition, R., 7-11, Appellants' reply, R., 44-45). The appellants' pleadings expressly admit that their private controversy with the appellees was previously disposed of in proceedings in the Ohio State Courts (R., 11, 44). Their application to intervene might

therefore have been denied by the Court below on the authority of *United States* v. *Northern Securities Company, et al.*, 128 Fed. 808, where the Court said, at pages 811-812:

> "The application for leave to intervene contains the further suggestion, made on information and belief only, that the proposed plan of disposing of the stock of the Northern Pacific and Great Northern Railway Companies would result in leaving the control of the two railroads in the hands of persons who co-operated in forming the Securities Company, and that the petitioners should be permitted to intervene and obtain further order to prevent such a result. . . .
>
> The United States is the complainant in this case. It is the conservator of the public welfare, and has a right to speak for the public. According to well-established rules, the petitioners cannot intrude into this litigation merely to protect the public interest or as *amici curiae* so long as the government is present by its attorney general and expresses its disapproval of such intrusion. This would be wresting from the government that control over the litigation, so far as the public is concerned, which it has a right to exercise. The petitioners can intervene only for the protection of their own individual interests, and for that purpose only in the event that they can obtain adequate protection in no other way."

They were, however, permitted to intervene in the anti-trust suit but for the sole purpose of calling the Court's attention to alleged violations of, or failure to conform to, the terms of its final decree or of subsequent orders or decrees made in furtherance of that decree. Their capacity was merely that of informers.

The appellants' effort was, in effect, to secure, by intervention in the anti-trust suit, the benefits of an in-

dependent suit in equity, seeking, upon the pretext of public interest, an injunction against an alleged violation of the Anti-Trust Act.

It is unnecessary to do more than refer to a few of the numerous authorities in this Court to the effect that the right to seek and obtain injunctive relief for public wrongs under the Anti-Trust Acts is confined to suits in equity by the United States under the direction of the Attorney General.

Minnesota v. *Northern Securities Company*, 194 U. S. 48, at page 70.

Wilder Manufacturing Company v. *Corn Products Refining Company*, 236 U. S. 165, at page 174.

Paine Lumber Company, Limited, et al. v. *Neal, etc.*, 244 U. S. 459, at page 471.

Geddes v. *Anaconda Copper Mining Company*, 254 U. S. 590, at page 593.

General Investment Company v. *Lake Shore & Michigan Southern Railway Company, et al.*, 260 U. S. 261, at page 286.

The appellants could not avoid the force of these decisions by intervening in the suit of the United States. Their intervention gave them no status as litigants in that proceeding and any order entered upon their petition would be solely for the protection of the public interest.

(b) THE ORIGINAL COMPLAINANT, THE UNITED STATES, HAVING ASSUMED THE PROTECTION OF THE PUBLIC INTEREST

BY SUPPLEMENTAL PETITION AND HAVING ACQUIESCED IN THE DENIAL THEREOF, THE APPELLANTS CANNOT USURP THE FUNCTION OF THE ATTORNEY GENERAL BY PROSECUTING AN APPEAL IN THE PUBLIC INTEREST.

When appellants' petition came on for hearing on June 5, 1922, the complainant, the United States, at first declined to participate in the proceeding on the ground that the public interest was too remote (R., 74). Subsequently, however, but before a decision was rendered on appellants' petition, the United States filed a supplemental petition (R., 62-72) alleging the same facts and asking for substantially the same relief. The appellants' function as informers, if it ever had a valid basis, ceased when the United States itself undertook the protection of the alleged public interest. The Court dismissed both petitions and the United States, the sole official and rightful conservator of the public welfare, has accepted that dismissal. It has not appealed therefrom. The appellants cannot usurp the function of the Attorney General by prosecuting in the public interest an appeal from an order in which he has elected to acquiesce.

United States v. *Northern Securities Company et al.*, 128 Fed. 808.

The appellate jurisdiction of this Court can only be invoked by a party having a personal interest in the litigation.

Smith v. *Indiana*, 191 U. S. 138.
McCandless v. *Pratt*, 211 U. S. 437.

The cases just cited also establish that one seeking to prosecute an appeal in behalf of a public interest does not have the requisite standing to maintain such appeal merely because he is a member of the public whose interest he seeks to assert and that in the absence of such standing the appeal will be dismissed by this Court.

(c) THE APPELLANTS, HAVING NO STANDING TO APPEAL IN THE PUBLIC INTEREST, AND THEIR PRIVATE INTERESTS HAVING BEEN FINALLY ADJUDICATED BY A COURT OF COMPETENT JURISDICTION, THE DECISION OF THE COURT BELOW WAS NOT A FINAL DETERMINATION OF ANY SUBSTANTIAL RIGHT OF THE APPELLANTS, AND THEY THEREFORE HAVE NO STANDING TO APPEAL.

The present appeal is maintainable only under the provisions of Section 2 of the Expedition Act, 32 Stat. L. 823, 36 Stat. L. 854, under which an appeal to this Court lies only from the *final decree* of the Court below. An adjudication is not final in such sense as to be appealable unless it involves a determination of a substantial right against a party in such a manner as leaves him no adequate relief except by recourse to an appeal.

> *Odell* v. *H. Batterman Co.*, 223 Fed. 292, 295.
> *American Brake Shoe & Foundry Company* v. *New York Railways Company*, 282 Fed. 523, 527.

As above pointed out, no right of the appellants was asserted by their petition or was in any way denied or involved in its dismissal. The public right asserted in

their petition was not *their* right. Their private rights had been finally determined by the Ohio Courts. The order of dismissal was therefore not a final decree of the court below from which they were entitled to appeal.

(d) AUTHORITIES PERMITTING, IN EQUITY SUITS BROUGHT BY THE UNITED STATES UNDER THE ANTI-TRUST ACT, INTERVENTION FOR THE PROTECTION OF PRIVATE INTERESTS AND RECOGNIZING A RIGHT OF APPEAL IN SUCH INTERVENORS, HAVE NO APPLICATION TO THE PRESENT CASE.

We of course do not assert that one may never, in an equity suit brought by the Government under the Anti-Trust Act, intervene for the protection of his private rights, or that he may not have an appeal from a denial of the rights which he asserts. Such intervention was permitted in the court of first instance in *Continental Insurance Company* v. *United States, Reading Company, et al.*, 259 U. S. 156, and in *Terminal Railroad Association* v. *U. S.*, 45 Sup. Ct. Rep. 5 (October Term, 1924, No. 115, decided October 13, 1924; not yet officially reported), and an appeal by the intervenors was heard by this Court in the former case. But the present case is quite different. These appellants were concluded by the decision of the State courts of Ohio, to which they saw fit to submit the determination of their private rights. They were estopped by the express terms of the contract of October 7, 1916 (R., 57-62) which Jones, their sole stockholder, signed, which he cooperated in submitting to the Court below and which that Court approved. They thereby forfeited any standing they might otherwise have had seasonably to present their private interests to that Court

and to appeal from its decision. They sought to intervene for the protection of the public interest only and such intervention, as we have shown, gave them no right of appeal to this Court.

In addition to the foregoing argument presented by us in support of our motion to dismiss we here desire to call the Court's attention to a decision released by the Court of Appeals of the State of New York on April 6, 1925, after our said motion and argument were filed. In this decision the Court held that the Association of the Bar of the City of New York had no standing to prosecute an appeal from a determination by the Appellate Division, refusing to disbar an attorney upon grounds presented by said Association. Judge Hiscock, speaking for the Court, said:

> ". . . it seems to us quite clear that the Association simply discharges the duty of calling to the attention of the Appellate Division, under our law charged with the duty of supervising the conduct of attorneys, some alleged misconduct and then, if the Appellate Division thinks that course should be pursued, discharges the further duty of prosecuting the accusation and presenting the evidence which will enable the Court finally to decide whether it should exercise its disciplinary powers, and that in following this course it occupies the status which might be occupied by any member of the profession and becomes a friend and agency of the Court rather than a party. It is not a party in any accepted sense. Its petition does not ask for any relief whereby existing rights may be confirmed or new ones secured. To use the precise language of its prayer in this matter it 'submits this matter (the alleged misconduct of respondent) to the Court and asks that such action may be taken

> as justice may require'. Thus it is in no legal sense a party asserting rights which, if granted, will be beneficial to it, and a decision adverse to its views does not lessen, impair or destroy any of its rights but affects only that interest which every member of the profession, and the entire community for that matter, has in the proper discharge by attorneys of the duties and responsibilities conferred upon them. In all of these features we see an entire lack of character as a party and an entire absence of legal interest based either upon alleged rights or upon a right and obligation to discharge certain official duties (*People ex rel. Burnham* v. *Jones*, 110 N. Y. 509), and the denial of which rights would present that situation of being aggrieved which would sustain an appeal."
>
> *Matter of Dolphin*, N. Y. Court of Appeals, not yet reported.

This decision of the Court of Appeals of New York very clearly lays down the principles above urged in support of our motion to dismiss, and which we contend control the disposition of the present appeal.

(e) Appellants' objections considered.

As we are repeating our previous argument as above pointed out upon the assumption that the Court may conclude to defer consideration of the questions raised by our motion to dismiss until the presentation of the case upon the merits, we think it proper to refer briefly to appellants' argument submitted in opposition to our motion.

In that argument appellants in substance urge the following objections to the granting of our motion:

1. That we did not object in the Court below to appellants' filing their intervening petition (pp. 1-7).

3. That appellants intervened chiefly because of their own important financial interest and only incidentally as informers as to the public interest (pp. 8-10).

4. That our motion and brief in support thereof involved the merits (pp. 10-12).

5. That appellants have not usurped or attempted to usurp the functions of the United States, the District Attorney or the Attorney General (pp. 12-13).

The following comments seem to be pertinent:

1. *With reference to appellants' first objection.*

It is true that we did not formally object to the filing of appellants' petition. Indeed we had no opportunity to do so. The Court's Order of December 6, 1921 (R., 111) indicates that the petition was presented *ex parte* and was ordered to be filed without preliminary hearing. The order directed service upon the District Attorney and the appellees and required answer within ten days.

It is not true, however, as appellants assert (Appellants' Motion Brief, p. 7) that we do not question the action of the Court below in allowing the petition to be filed or that we concede appellants' right to make the intervention. We pointed out (*supra*, pp. 10-11) that the application to intervene might have been denied by the Court below on the authority of *United States v. Northern Securities Company et al.* (128 Fed. 808). We also pointed out (*supra*, p. 11) that while appellants were permitted to intervene in the anti-trust

suit, they were admitted solely in the capacity of informers. In other words, we then contended and now contend that the only conceivable justification for permitting the appellants to file their petition was that they might, in the public interest, call attention to alleged violations of the Court's final decree, and that the fact that appellants rightly or wrongly were permitted to file the petition for that purpose did not give them standing to appeal from the dismissal of their petition. There is an obvious *non sequitur* in appellants' argument that because they were permitted to file their petition and because we answered it, they thereby acquired the right of appeal. They cite no authority in support of this contention.

The cases cited by us (*supra*, p. 13):

> *Smith* v. *Indiana*, 191 U. S. 138,
> *McCandless* v. *Pratt*, 211 U. S. 437,

and the decision of the Court of Appeals of New York in *Matter of Dolphin* (*supra*, pp. 16-17) are clear authorities that appellants' right to maintain an appeal does not depend upon the fact that they may have had a right to be heard in the Court below, but upon whether they had such direct interest in the subject matter of the decision below as to constitute them parties aggrieved thereby.

Appellants' brief on the motion (pp. 3-5) discusses at some length whether the Buckeye Company was a party before presentation of the petition of December 6, 1921. While appellants concede that the question is unimportant, we consider it as it may have a possible bearing upon their later argument (Appellants' Motion

Brief, p. 8) that the Federal Court had prior jurisdiction *over all the parties.* The fact that both appellants and the Court deemed it necessary that leave be granted to file the petition, *i. e.*, that an intervention be permitted, clearly indicates that they were not previously parties. The Order of January 27, 1923 (R., 72-73) is even more conclusive. It directed that *appellants* be made *parties defendant* to the Government's supplemental petition and that copies be served upon both *appellants and appellees.* The distinction made between the appellants and appellees is very clear. The appellees, who were parties to the original suit, did not have to be made parties. The contrary was true of appellants.

Appellants undertake to supplement their doubtful resort to inference to establish their status as parties by asserting that they became parties by intervention under Equity Rule 37. But appellants cannot thus establish their status as litigants. The rule provides that "anyone *claiming an interest* in the litigation may at any time be permitted to assert *his right* by intervention," etc. (Italics ours). Appellants' petition did not claim an interest in the litigation and did not assert any right *of appellants.* In their petition and reply appellants went out of their way to point out that their petition was filed not to assert individual rights but to protect an alleged public interest (R., 11, 44). They were informers, not parties in interest, and therefore not litigants. Doubtful as we have already shown their right to come in even as informers to be, it is enough for our purpose that their so-called intervention asserted no right of appellants a denial of which could support an appeal.

2. With reference to appellants' second objection.

It is difficult to follow the tortuous course of appellants' assertions as to the theory upon which they filed their petition, or as to the effect of the prior decision of the Ohio Courts. Their petition (R., 11) said:

> "Lately the Ohio Court of Appeals for Perry County has decided in a suit to quiet title and over the contention of your petitioners, that *as between your petitioners and the said railroad and trust companies* said Section 9 of Article 2 of said mortgage is valid." (Italics ours.)

The petition then prayed that any demand or collection of the 2 cent royalty be enjoined and that the Buckeye lands be released from the mortgage, particularly Section 9 thereof or for "such other and appropriate order herein as will effectively carry out the purpose and effect of the main decree herein."

In the Ohio suit there was an issue between appellants and appellees as to the validity of the mortgage and covenants "*including the matters and things now set up in respect thereof in the petition of the appellants herein*" (R., 246. Italics ours) and upon the trial the mortgage and covenants were adjudged valid and binding (R., 246). The appellants have approved the above as a correct statement of those proceedings (R., 249).

In their reply of March 21, 1922, appellants refer as follows to the Ohio suit:

> "Petitioners aver that the proceedings mentioned in paragraphs 15 of said answers were not decided in a case in which any person representing the public, either state or federal, was present or involved; *that no questions of public policy were considered* and that the cases were so de-

cided simply, solely and technically upon the ground that the Buckeye Coal & Railway Company had actually and physically executed the $20,000,000 mortgage made by the Hocking Valley Railway Company, thereby pledging its lands as additional security to said bonds; and that such decision *is not res adjudicata in this cause, wherein matters of public policy are involved* and in which the main decree was entered about four or five years before the proceedings set up in said paragraphs 15 were begun and carried on, and that such proceedings cannot, therefore, have any controlling effect upon the propriety and effect of said principal decree entered in this cause or of what should be done in this case upon the present petition." (R., 44. Italics ours.)

Appellants' principal brief characterizes the Ohio suit as follows:

"The Sherman Anti-Trust act was not involved in that suit to quiet title; *no person represented the public;* neither the United States nor the State of Ohio was present. It was simply a private suit between the persons named, *relying on the decree of March 14, 1914,* and being such suit, the court of common pleas, in January 1920, decided the case on the merits in favor of defendants, thereby for the purposes of that suit sustaining the validity of the mortgage. *That court disregarded all public policy,* disregarded the opinions and decrees of the federal court in this case, *and treated the suit simply as a private dispute* between the parties named." (pp. 12-13. Italics ours.)

"The Buckeye Company went into the state court *relying upon the decree of March 14, 1914,* and urged the state court to clear the title to its lands in conformity with that decree. If the state court refused in such a proceeding to recognize the validity of the decree of March 14, 1914, and arrived at some other conclusion, that conclusion is not binding upon the Federal Court. Especially

> is this true as the *two petitions before the court in June, 1923, are founded upon that decree of March 14, 1914, and only asked its enforcement* and one of those petitions was presented by the United States. *Certainly so far as the United States is concerned, so far as public policy is involved, so far as the enforcement of the Sherman Anti-Trust Act is in question, the state court could not adjudicate contrary to the decree of March 14, 1914.*" (pp. 38-9. Italics ours.)

Again referring to the charge that their present petition seeks inequitable results, appellants say:

> "Jones had done nothing inequitable, but even if he had, yet *in behalf of the public* the separation must be carried out whoever may suffer." (p. 43. Italics ours.)

and finally, appellants, commenting on the decision of the Court below, say:

> "A violation of the decree of March 14, 1914, is condoned and encouraged. The petitions both of the Buckeye Coal Co. and of the United States are denied, *and the interests of the public are left to care for themselves in the best manner they can.*" (p. 45. Italics ours.)

We think it unnecessary to add to appellants' characterization of the effect of their petition. We submit that their tardy discovery (Appellants' Motion Brief, p. 8) that they "intervened chiefly because of their own important financial interest and only incidentally as informers as to the public interest" is not convincing. They cannot now escape the record which they themselves have made, and in any event they avoid one horn of their dilemma only to impale themselves upon the other. If and insofar as they intervened to protect their

private interest, the Ohio suit, which the record shows involved all the grounds of illegality and invalidity asserted in their present petition, is *res adjuaicata* against them. If, as we have shown, they sought the public interest solely, they were mere informers, not litigants, and have no standing to appeal.

Their suggestion (Appellants' Motion Brief, pp. 8-10) that the Federal Court acquired prior jurisdiction is not well founded. As appellants did not become parties to the anti-trust suit, even in a qualified sense as informers, until December 6, 1921, after the termination of the Ohio litigation, the Federal Court did not have prior jurisdiction of the parties. Nor did it have prior jurisdiction of the subject matter.

United States v. *Northern Securities Company*, 128 Fed. 808, at page 812.

3. *With reference to appellants' third objection.*

Our motion to dismiss does not involve the merits. Appellants base their assertion to the contrary upon the fact that we adopt the statement of facts by the Court below. A statement of facts is required by Clause 1 of Rule 6 of this Court and so of course the recital of the facts raises no inference whatever that the motion is made on the basis of any dispute as to facts so set out. The grounds of our motion to dismiss are perfectly clear: *i. e.*, that it appears on the face of the record that the appellants have no standing to prosecute an appeal to this Court. Their own pleadings disclosed their lack of such standing in that they

sought in the Court below to present as informers a question solely of the public interest. This Court has but to look at the face of their petition and the claims which appellants themselves assert therein to ascertain that this is so.

4. *With reference to appellants' fourth objection.*

This objection takes exception to our characterization of appellants' proceedings as an attempt to usurp functions of the United States or the Attorney General. They again deny that they filed their petition solely to call the Court's attention to an alleged violation of its final decree or subsequent orders. They say that the petition, answers and reply are general, unlimited and unconditional in character except as they may have been limited by their terms. As we have pointed out, it is this very limitation of the scope of appellants' intervention by the terms of their own pleadings upon which we base our argument that they have no standing to appeal. They are concluded by the issues which they themselves have framed.

Nor is their suggestion that the United States has never objected to their intervention persuasive or material. Disregarding appellants' strenuous objection to the filing of the Government's supplemental petition which they asked be stricken from the files (R., 73), thus seeking to exclude the official guardian of the public interest from the control of this feature of the litigation, the controlling fact is that after appellants' petition was filed the Government filed its supplemental petition alleging the same facts and asking for similar, though not

identical, relief, and by failing to appeal has acquiesced in the Court's dismissal of that petition. It would be preposterous and absurd if appellants, asserting solely a public interest as we have shown, could be permitted by appeal to seek, for the public benefit, relief which the Attorney General, the custodian of the public interest, no longer deems desirable.

We believe that the argument on our motion and now advanced should finally dispose of this case and that the appeal should be dismissed. But in the event that this Court is of the opinion that the appeal should be entertained by it, we proceed to present what seem to us controlling reasons why the order of the Court below dismissing appellants' petition was clearly right and should be affirmed.

II.

The Court Below Properly Dismissed Appellants' Petition Because That Petition Sought a Modification of a Final Decree Which That Court Was Without Jurisdiction to Grant.

(a) The opinion of the Court below recognized that its previous orders finally determined the disposition to be made of relationships between the Hocking Valley, Buckeye and Central Trust Companies.

In its opinion directing the dismissal of the appellants' petition the Court below said:

"So far as concerns the petition of the Buckeye Company and the Sunday Creek Company, we think it clear that relief should be denied. While our jurisdiction generally to make such further orders and decrees as should be necessary to the due execution of our main decree, and the complete dissolution of the condemned combination, continued without abatement until such complete dissolution should be effected (*United States* v. *L. S. & M. S. Ry. Co., et al., supra*), there is perhaps substantial force in the thought that the order of this court of May 19, 1916, and the sale of the Buckeye Company's stock thereunder, exhausted the jurisdiction of this court over the specific question whether the situation created by the lien of the Hocking Valley mortgage upon the Buckeye Company's lands, given to secure the Railroad's indebtedness, in connection with the tonnage royalty provision, was so far unlawful as to require its elimination. This court approved the sale of the stock to Jones with full knowledge of the fact situation now complained of, and presumably without its occurring to either court or Government's counsel that the situation created a substantial interference with the free competition aimed at by the original decree. The action taken might not improperly be thought to carry a tacit implication that the situation here presented was not then regarded open to criticism" (R., 113).

(b) THE LOWER COURT'S OWN VIEW OF THE FINALITY OF ITS PREVIOUS ORDERS IS SUPPORTED BY THE HISTORY OF THE PROCEEDINGS AFFECTING THE BUCKEYE PROPERTY.

The force of the foregoing is apparent from a review of the present record with respect to what occurred previous to the rendition of that opinion. For brevity we hereinafter refer to The Hocking Valley Railway Company as the Hocking Valley, to the Buckeye Coal & Railway Company as the Buckeye, and to the Central

Trust Company of New York (now Central Union Trust Company of New York) as the Central Trust.

The original opinion (203 Fed. 295; R., 117-164), wherein the Circuit Judges concluded that a combination in violation of the Anti-Trust Act existed in certain respects as alleged in the Government's bill, awarded relief, speaking broadly: *First,* with respect to relations between certain defendant railroads, and, *Second,* with respect to relations between certain defendant railroads and certain coal properties. Upon the second aspect of the case, material findings of the Final Decree, entered March 14, 1914 (R., 165-183), are as follows:

> "(9) Railroad Acquisition and Control of Coal Properties. Pursuant to the plan of reorganization of 1899, the Buckeye Coal & Railway Company was incorporated under the laws of Ohio, and the Hocking Valley and this coal company joined in the execution of a mortgage under date of March 1, 1899, providing for the issue of first-mortgage bonds in the sum of $20,000,000, and secured by the properties acquired by such companies. This coal company was organized for the purpose of obtaining the coal properties of the Hocking Coal & Railroad Company, and these properties were bid in and conveyed to the Buckeye Coal & Railway Company by the purchasing trustees at the judicial sale before mentioned, and such trustees received from the new coal company 2495 shares of its total capital stock of 2500 shares, and thereupon entered into a traffic agreement with the Hocking Valley to secure rail connections between coal mines and the main railroad line and also coal transportation, and the trustees at the time turned over the stock in the coal company to the Hocking Valley . . ." (R., 170-171).

"(10) Merger of Coal Interests Into Sunday Creek Company.* (a) The holdings in these coal properties were subsequently merged and placed in the Sunday Creek Company (not the Sunday Creek Coal Company). The Sunday Creek Company was organized under the laws of New Jersey with a capital stock of $4,000,000; and it now controls more than 100,000 acres of land situated in the Hocking coal fields and the Kanawha coal district, together with about fifty coal mines and about three hundred and fifty coke ovens, which are tributary to the exclusively Ohio railroads before named and the Kanawha & Michigan. . . .

"(b) Special Trusts Created Respecting Shares in Sunday Creek Company. The Toledo & Ohio Central caused its shares in the Sunday Creek Company to be issued in the name of John H. Doyle, Trustee; and in April, 1908, just before the commodities clause of the Hepburn Act was to take effect, and in view of doubts as to its constitutional validity, the company entered into an agreement with him, by which the stock was in terms sold to him as trustee for the stockholders of the company, in whose names its stock might from time to time be registered and to whom dividends should be paid, and the certificate of stock and the contract have ever since been in his possession. On April 30, 1908, another contract similar to the one just mentioned was entered into between the Hocking Valley and the Central Trust Company of New York, respecting the shares of the former in the Sunday Creek Company. After reciting, among other things, that all of these

* To avoid confusion we should here explain that there were at various times three corporations whose corporate name contained the name "Sunday Creek". (1) The Sunday Creek Coal Company, an Ohio corporation existing prior to 1905; (2) The Sunday Creek Company (the company above referred to), a New Jersey corporation, organized in 1905, and whose name about 1916 was changed by John S. Jones to The Sunday Creek Coal Company; and (3) The Sunday Creek Coal Company, an Ohio corporation, organized by Jones in 1919, in connection with the merger of his numerous coal properties.

shares with others were pledged to the trustee as collateral security for the bonds issued under the first consolidated mortgage of the Hocking Valley and the Buckeye Coal & Railway Company, it was in terms agreed that the Hocking Valley had sold and assigned to the trustee all its interest in such shares of stock, subject to the lien of the mortgage and the rights of the bondholders thereunder, in trust, for the proportionate benefit of the holders of record of the stock of the Hocking Valley and for any distribution of its assets; that the trustee should have the right to vote the shares, to collect dividends, and (if the company was not in default under its mortgage) to distribute them among the holders of the stock. Further provision was made, common to both of such trust agreements, that in the event the Supreme Court should hold the commodities clause of the Hepburn Act constitutional, the trustees should sell such shares of stock and distribute the proceeds (subject to the lien of the mortgage before mentioned respecting the Hocking Valley shares) among the registered stockholders in the Toledo & Ohio Central and the Hocking Valley respectively. However, this provision has never been executed; the trustees still hold the legal title to the stock." (R., 172-173.)

References to the same facts also appear in the opinion of the Court (R., 124-125; 128-129). With respect to the relations thus found to exist the Court decreed as follows:

"(1) Sale of Railway Companies' Interests in Stock of Sunday Creek Company. That the equity and interest of the Lake Shore & Michigan Southern Railway Company, the Toledo & Ohio Central Railway Company, the Chesapeake and Ohio Railway Company and the Hocking Valley Railway Company, and each of them, in the capital stock of the Sunday Creek Company, shall be disposed of

by absolute sale. That the legal title to said stock held by the trustees, viz., John H. Doyle and the Central Trust Company, under the certain agreements of April 30, 1908, in substance described in the findings of fact aforesaid, be included in said sale, and that said sale be made free from every interest or claim of said trustees or either of them, and of any and all the railway companies last named, and of the stockholders of each and all of them.

"That said the Hocking Valley Railway Company, the Toledo & Ohio Central Railway Company, the Lake Shore & Michigan Southern Railway Company, and the Chesapeake & Ohio Railway Company, each and all of them, be and they hereby are perpetually enjoined from directly, or indirectly, owning, holding or acquiring any stock in said Sunday Creek Company, or in any of the companies hereinbefore named, the property of which is owned, leased or controlled by said Sunday Creek Company, intending hereby to impose an absolute prohibition against said railway companies, or any of them, owning or controlling any shares of stock in said Sunday Creek Company, or otherwise owning or controlling, directly or indirectly, any interest in any of the coal properties in which that company is interested; and that the Sunday Creek Company be and it hereby is perpetually enjoined from directly, or indirectly, permitting any share or shares of its capital stock to be voted by or on behalf of any of the said railway companies for any purpose whatever, at any meeting or otherwise of the stockholders of said Sunday Creek Company, or permitting any of such railway companies to exercise any control over or to have anything to do with the management of said Sunday Creek Company, and likewise from paying any dividends to or for any of such railway companies" (R., 177-179).

Provisions followed prescribing the time and method of sale.

The Final Decree also contained the following provision retaining jurisdiction:

> "(8) That jurisdiction of this cause be retained by this court for the purpose of making such other and further orders and decrees as may be necessary to the due execution of this decree and the complete dissolution of the combination and monopoly herein condemned" (R., 183).

Pursuant to the directions of the Final Decree the stock of the Sunday Creek Company was, with the approval of the Court, sold to John S. Jones (R., 184, 187, 250). This sale took place about October 1, 1914 and in connection therewith the Court approved the issue by the Sunday Creek Company of certain mortgage bonds; and the holding thereof for a limited time by the Hocking Valley (R., 185, 188, 250).

Subsequently, and prior to May 19, 1916, the corporate name of the New Jersey corporation, the Sunday Creek Company, was changed to Sunday Creek Coal Company (R., 205).

At the time the Final Decree of March 14, 1914 was entered the Court supposed that the sale of the stock of the Sunday Creek Company to a purchaser approved by the Court would effectually break up the combination so far as the union of coal and railroad interests was concerned (R., 205) although the provision of the decree retaining jurisdiction was later held by the Court to be broad enough to permit it to make the further order of May 19, 1916, hereinafter mentioned (R., 206).

Without further proceedings before, or action by, the Court, however, the Hocking Valley and The Chesapeake and Ohio Railway Company, its principal stockholder,

on July 26, 1915, filed with the Court a report that they were about to enter, subject to the approval of the Court, into a contract for the sale of the capital stock of the Buckeye and certain stock and bonds of the Ohio Land and Railway Company (R., 201). The Final Decree, as above quoted, had found that these securities were acquired in connection with the Reorganization of 1899 (R., 171); that they had been pledged under the First Consolidated Mortgage of the Hocking Valley and the Buckeye, and that, subject to that pledge, they had been trusteed for the stockholders of the Hocking Valley (R., 173). The contract mentioned in the report of July 26, 1915, provided for the sale of these securities to one Poston, and that there should be issued to the Central Trust, in exchange for the bonds of the Ohio Land and Railway Company, $700,000 of income mortgage bonds of a purchasing corporation to be organized by Poston (R., 201-202).

The Appellants' brief is not quite accurate in suggesting (page 4) that the Court, in its opinion of July 30, 1915 (R., 183-189), unqualifiedly disapproved the sale by reason of the income bond provision. The opinion contemplated the ultimate approval of the sale, including the holding by the Hocking Valley for the time being of the income bonds, provided, *first*, that the Court be satisfied that a sale for cash was impracticable (R., 186) and, *second*, that certain provisions be made to insure the coal property against railroad domination (R., 187-188). The parties later proposed certain modifications in the contract but they were not sufficient to satisfy the Court (R., 202, 204), and anyway Jones presently made a cash

offer and so the Poston contract was abandoned (R., 57-62, 209-212).

The concluding paragraph of the opinion of July 30, 1915, reads as follows:

> "5. In these recent proceedings it has been brought to our attention that the Hocking owns $190,000 of Kanawha bonds. Upon the hearing of the present petition counsel for the United States orally suggested that there were other coal properties and interests still held by some of the defendants in the principal case which under the decree it was their duty to sell. Upon the ninth day of October, 1915, we will hear any application which the Government's counsel desire to make upon any of these subjects. Suitable advance notice to all parties interested should be given so that there is opportunity for pleadings or affidavits in opposition and *so that on that day all matters, if any there are, which require our attention in order to carry out the decree may be ripe for hearing and disposition*" (R., 188-189, italics ours).

It will thus be observed that it was the Court's intention that on October 9, 1915, all matters which might require attention in order to carry out the Decree of March 14, 1914, should be presented and disposed of. It was clearly the purpose at that time to do whatever might be necessary under the reservation of jurisdiction contained in its Final Decree, in other words to exhaust that reservation.

Acting upon the Court's suggestion, the Government filed a petition (R., 189-192), whose prayer, so far as material, was as follows:

> "Wherefore Your Petitioner Prays, that the defendant, The Hocking Valley Railway Company,

be required to sell, free from any claim, lien, or equity of any of the parties to this suit, including the lien of the Central Trust Company of New York, as Trustee under the Consolidated Mortgage made by The Hocking Valley Railway Company to it, and free from any equity in the stockholders, or any of them, of said The Hocking Valley Railway Company, and subject to approval, rejection, or modification by the Court, all of the capital stock in said The Buckeye Coal & Railway Company, in said The Ohio Land & Railway Company, in said The Boston Coal Dock & Wharf Company, in said The Raybould Coal Company, and also the bonds of said Kanawha and Hocking Coal and Coke Company, owned by said The Hocking Valley Railway Company. . . .

"That the defendant Railway Companies be required to sell any other coal properties owned by them, or by either of them, in which the Sunday Creek Company (now the Sunday Creek Coal Company) is interested, on terms subject to approval, rejection, or modification by the Court.

"That if within a period to be fixed by the Court, defendants do not comply with the decree in this respect, and report the same to the Court for its action thereon, that the Court will otherwise provide for the sale of such stocks and bonds, or of such coal properties, unless for good cause shown, the Court further extends the time, by such action as it may deem necessary and adequate to such purpose, either through appointment of a master to make such sale or of a receiver to take possession of said stocks and bonds, and said coal properties, with power to sell and dispose of the same, or in such other manner as will enforce compliance with the decree in this respect" (R., 191-192).

The Government, insofar as it sought a sale of the Buckeye stock and the stock and bonds of The Ohio Land & Railway Company, thus demanded action which the railroad companies had already proposed in their peti-

tion of July 26, 1915. Answers having been filed (R., 192-201) and evidence submitted (R., 203), the Court, on May 19, 1916, ordered as follows:

> "(a) The equity and interests of the Hocking Valley Company and the Chesapeake & Ohio Railway Company in and to the certain capital stock, to wit, 2500 shares in the Buckeye Coal & Railway Company, 2006 shares in the Ohio Land & Railway Company and $1,377,000 face value of the first mortgage bonds of the latter company, shall be disposed of by absolute sale; and the Central Trust Company of New York, as trustee under the first consolidated mortgage of the Hocking Valley, and as trustee under the contract of April 30, 1908, shall, upon the conditions hereinbelow stated, release all claim as trustee and as pledgee of such shares of stock and such bonds, and of each of them, upon receipt or tender of the proceeds derived from the sale or sales of such stocks and bonds respectively, provided, that in every instance such proceeds of sale shall be received and applied by such trustee under and according to the provisions of Article Seven of the first consolidated mortgage of the Hocking Valley to such trust company, bearing date March 1, 1899 (Vol. V. Tit. Exhibits, at p. 98). Should the Central Trust Company fail seasonably or refuse to release such stocks or bonds, or both, by proper delivery of the certificates representing the stocks or of the bonds mentioned, then and in any such event sale or sales will be made under appropriate orders of the court. The sales and releases of stocks and bonds thus provided for shall be made free from every interest or claim of each of such railway companies and their respective stockholders and also of the Central Trust Company in both of its capacities as trustee" (R., 206-207).

Said order, after making certain provisions with reference to the time and manner of effecting the sales so ordered, proceeded:

> "(b) In view of the state of the evidence respecting the sale of stocks and bonds mentioned in the last petition of the United States, *other than the particular stocks and bonds above ordered to be sold,* and of the absence of any showing of immediate necessity to pass upon the questions so involved, further consideration of those matters will be postponed; but any of the parties concerned shall have the right to take further evidence within a reasonable time and again to present the subjects, *not herein distinctly passed upon,* for the consideration and decision of the court" (R., 209). (Italics ours.)

The steps taken by the railroad companies to comply with the order last referred to appear in their petition and motion filed October 5, 1916 (R., 209-212); pursuant to which they submitted a contract, dated October 7, 1916 (R., 57-62), for the sale to Jones of the stock of the Buckeye and the stock and bonds of The Ohio Land & Railway Company. On October 7, 1916 the Court approved for entry an order finding

> "that said purchaser is satisfactory to the court and that said sale complies with the order entered herein on May 19, 1916, and that the terms of the contract of sale are, and the amount of cash paid for said securities is, such as to fully protect the interests of Central Trust Company of New York, Trustee, and that the price proposed to be paid for said properties is the reasonable value thereof" (R., 213);

and then proceeding:

> "It is ordered that said sale and the terms thereof as embodied in the contract now submitted to this court be and the same hereby are approved and that said Central Trust Company, Trustee, upon due application to it in accordance with the

terms of the First Consolidated Mortgage of the Hocking Valley Railway Company as provided in said contract, release said stocks and bonds from the lien of said mortgage upon the payment to it of the purchase price thereof.

"Approved for entry upon the dismissal of the appeal of the Central Trust Company from the order of May 19, 1916" (R., 213).

The appeal of Central Trust having been dismissed, the Court, on November 10, 1916, directed entry of the order approved on October 7, 1916 (R., 212).

The contract of October 7, 1916, thus approved by the Court below, contained the following recitals:

"(c) The Hocking Company heretofore acquired all said outstanding stock and bonds of the Ohio Company, and all said outstanding stock of the Buckeye Company, and thereupon duly pledged and deposited the same (except five shares of stock of each of said Companies held by directors thereof) under the First Consolidated Mortgage, dated March 1, 1899, made by the Hocking Company and the Buckeye Company to Central Trust Company of New York, Trustee, securing an authorized issue of $20,000,000 of First Consolidated Mortgage Four and One-Half Per Cent. Gold Bonds of the Hocking Company, and said stock and bonds are now deposited with and held by said Trustee under said mortgage" (R., 58). . . .

"(f) By said First Consolidated Mortgage the Buckeye Company conveyed certain real estate in said mortgage described as further security for the payment of said First Consolidated Bonds of the Hocking Company and among other things agreed to pay to said Trustee thereunder a sum equal to two cents per ton on all coal mined from its property so mortgaged, to be applied in purchasing bonds secured by said mortgage" (R., 59).

It provided in part as follows:

> "Fifth. The Hocking Company and the Chesapeake Company hereby waive and release any and all claims of every character or description against the Buckeye Company, the Ohio Company and the Purchaser or any of them by reason of any liability or claim which might be asserted by the Hocking Company, the Chesapeake Company, or either of them, against the Ohio Company or the Buckeye Company by reason of any matter or thing whatsoever occurring to the date of this agreement; except that nothing in this Article Fifth, or elsewhere in this Agreement contained is intended or shall be construed in any wise to limit or affect or impair the several covenants or obligations of the Buckeye Company contained in said First Consolidated Mortgage of the Hocking Company, and the Hocking Company and the Chesapeake Company respectively do not hereby waive or release the Buckeye Company, its successors or assigns from any such covenants and obligations. If the Hocking Company at any time defaults in the payments or other obligations imposed on it by said consolidated mortgage, and said mortgage is enforced or foreclosed in any way or to any extent, the Hocking Company agrees that it will cause all the property of the Hocking Company to be first exhausted before any recourse is had under said mortgage to the property of the Buckeye Company and agrees to indemnify and to save and hold harmless said Buckeye Company from any loss or damage to or payment by said Buckeye Company under the provisions of said mortgage, save only said two cents per ton royalty abovementioned" (R., 60-61).

It is the mortgage lien and the 2 cent royalty provision mentioned in the above quotations that the appellants now seek to have cancelled (R., 11).

From the foregoing recital of the various proceedings before the Court leading up to, and in connection with, the sale to Jones of the Buckeye stock, certain salient facts are to be noted:

1. That the Court was from the first familiar with the relationships, both with respect to stock ownership and the mortgage lien, between the Hocking Valley, the Central Trust and the Buckeye (R., 124-125; 170-171).

2. That the Final Decree of March 14, 1914, so far as it dealt specifically with the coal properties, directed the sale only of the stock of the Sunday Creek Company of New Jersey (R., 177-9; 205-6).

3. That the Order of July 30, 1915, contemplated that the further proceedings on October 9, 1915, thereby directed, should cover all matters which required attention under the reservation of jurisdiction in the Final Decree.

4. That the Government's petition of October 9, 1915, filed in response to the order of July 30, 1915, and the Court's Order of May 19, 1916, thereon, which considered specifically the relations of the Hocking Valley and the Central Trust with the Buckeye and other companies, contemplated and directed, insofar as those relations were concerned, the sale only of the stock of the Buckeye and of the stock and bonds of the Ohio Land and Railway Company.

5. That the Order of May 19, 1916, reserved jurisdiction only of questions not connected with the specific matters dealt with therein, *i. e.*, the relationships exist-

ing between the Buckeye, the Ohio Land and Railway Company, the Hocking Valley and the Central Trust.

6. That although the Jones contract of October 7, 1916, made pursuant to the order of May 19, 1916, referred again to the provisions of the First Consolidated Mortgage of the Hocking Valley and the Buckeye, and expressly provided that the Buckeye should continue to observe and comply with these provisions, the Court "with full knowledge of the fact situation" (R., 113) approved the contract without qualification, and its order of approval contained no reservation of jurisdiction whatever.

We are not concerned upon the present appeal with the question whether the Court below has sufficiently reserved jurisdiction to make further orders, in so far as it may deem such orders necessary in connection with other relationships than those between the Hocking Valley, the Buckeye, and the Central Trust. We do contend that the Court has made it abundantly clear that, so far as the relationships between those companies are concerned, it intended, by the series of orders entered July 30, 1915, May 19, 1916 and November 10, 1916, to completely and finally dispose of the question of the dissolution of those relationships. The last of those orders remained in effect, unchallenged and unquestioned by anyone, for more than five years,—in other words, until the appellants' petition was filed on December 6, 1921 (R., 7). The term at which the order of November 10, 1916, was entered had then long since expired. All parties acquiesced in each of those orders with the single exception of the Central Trust, whose appeal from the

Order of May 19, 1916, was subsequently dismissed voluntarily (R., 34, 212).

(c) THE DECISIONS OF THIS COURT SUSTAIN OUR CONTENTION THAT THE LOWER COURT'S PREVIOUS ORDERS AFFECTING THE BUCKEYE CONSTITUTE A FINAL DECREE WHICH COULD NOT BE MODIFIED AFTER THE EXPIRATION OF THE TERM AT WHICH IT WAS ENTERED.

We have shown that the Order of May 19, 1916, and the confirmation of the sale made pursuant thereto, constituted a final adjudication of the matters before the Court. Nothing further remained to be done, nor did the Court retain any jurisdiction to do anything, with respect to the subject matter thereof. The action of the Court, as embodied in those orders, was a complete determination of the issues before it. That such a final determination, though made upon a matter distinct from the general subject of the litigation, is a final decree which cannot be annulled, enlarged or modified by the Court after the term at which it was entered has expired, is settled by the decisions of this Court.

Central Trust Co. v. *Grant Locomotive Works,* 135 U. S. 207.

See also

Keystone Manganese and Iron Company v. *Martin,* 132 U. S. 91.

McGourkey v. *Toledo and Ohio Central Railway Company,* 146 U. S. 536.

III.

The Court Below Properly Dismissed Appellants' Petition Because the Situation Therein Disclosed Involved No Violation of the Anti-Trust Act or of That Court's Final Decree.

But even if we assume that our conclusions set forth in Point II of this brief are open to question, and that it was still open to the Court below to consider the question whether the relationships between the Buckeye, the Hocking Valley and the Central Trust, not terminated by its prior orders, should be further interfered with, nevertheless the action of the Court in dismissing appellants' petition was clearly right because that petition disclosed no situation involving any violation either of the Anti-Trust Act or of the Court's final decree of March 14, 1914.

(a) THE OPERATION OF BITUMINOUS COAL MINES ON THE BUCKEYE LANDS IS AN INSIGNIFICANT PART OF THE HIGHLY COMPETITIVE BITUMINOUS COAL MINING INDUSTRY IN THE UNITED STATES; THE PROVISIONS OF THE CONSOLIDATED MORTGAGE RESPECTING THE BUCKEYE LANDS ARE TOO INCONSEQUENTIAL AND REMOTE TO CONSTITUTE A RESTRAINT OF TRADE OR A MONOPOLY UNDER THE ANTI-TRUST ACT.

The lands formerly owned by The Buckeye Coal and Railway Company, now owned by the appellant, The Sunday Creek Coal Company, and subject to the mort-

gage lien and the 2 cent royalty covenant, have an area of a little over 11,000 acres and contain a little over 18,500,000 tons of unmined bituminous lump coal (R., 248). It is a matter of common knowledge that 11,000 acres of coal lands form an insignificant portion of the total acreage of bituminous coal lands in the United States, or, for that matter, of the total acreage—100,000 acres—of coal lands involved in the combination against which the Decree of March 14, 1914 was directed (R., 172).

It is equally well known that 18,500,000 tons is an insignificant portion of the total tonnage of unmined bituminous coal in the United States. There were more than 460,000,000 tons of bituminous coal produced and more than 8,000,000 acres of bituminous coal land operated in the United States during the year 1919. In this same year there were 442,887 acres of bituminous coal land operated in Ohio alone, and 1,834,207 acres operated in West Virginia.

> Fourteenth Census of the United States, 1920, Volume XI, "Mines and Quarries, 1919", pp. 274, 285.

The courts will take judicial notice of the foregoing official statistics.

> *State* v. *Barrett,* 172 Ind. 169, 87 N. E. 7.
> *Chicago & A. R. Co.* v. *Baldridge,* 177 Ill. 229, 52 N. E. 263.
> *State* v. *Braskamp, et al.,* 87 Iowa 588, 54 N. W. 532.
> 23 C. J. 161, n. 80.

And this Court upon appeal can properly take judicial notice of any matter of which the court of original jurisdiction may properly take notice.

Pennington v. *Gibson,* 16 How. 65.
Varcoe v. *Lee,* 180 Cal. 338, 181 P. 223, 225.

These facts demonstrate that the relationships now existing between the Hocking Valley and the Buckeye are with respect to a negligible fraction of the bituminous coal industry. These indirect relationships impose and can impose no direct restraint upon even this negligible factor in the industry, an industry which the United States Coal Commission has reported to Congress to be in a highly competitive condition.

Final Report of the United States Coal Commission, dated September 22, 1923 (mimeograph), p. 13.

Appellants argue that the lien of the consolidated mortgage on the Buckeye lands created an interest of the Hocking Valley in the Buckeye properties which must be dissolved under the provisions of the Decree of March 14, 1914, and the Anti-Trust Act. They admit, however, that in view of the sound financial condition of the Hocking Valley, and in view of the contract of October 7, 1916, providing that in the event of foreclosure of the mortgage the Buckeye lands are not to be resorted to until after exhaustion of the Hocking Valley's properties (R., 61), the possibility of recourse to the Buckeye lands under foreclosure proceedings is extremely remote (Appellants' Brief, 28). The significance of this fact,

thus admitted by the appellants, was fully appreciated by the Court below. Referring to the Government's supplemental petition, that Court said:

> ". . . it seems plain that even in view of the Reading decision the criticized situation is not so clearly improper, nor so substantial, as to justify the action which the Government now asks. Whatever theoretically potential interference with free competition might otherwise be created by the railroad-mortgage lien upon the Buckeye lands in connection with the royalty tonnage provision, we think such interference practically reduced to a minimum by the fact that by the contract between Jones and the railroad companies the railroad property must first be exhausted before resort can be had to the coal lands, in connection with the fact that no suggestion is made that the railroad property is not entirely adequate to meet the payment of the mortgage in full, and the payment of the mortgage puts an end to the royalty. Indeed, an affirmative inference, more or less strong, in favor of the adequacy of the railroad security seems fairly deducible from the record presented to us. We therefore think that it will be time enough to question the invalidity of the situation we are discussing when, if ever, it becomes acute.
>
> "We are accordingly constrained to dismiss the Government's supplemental petition" (R., 114-115).

The interest of the Hocking Valley in the Buckeye by virtue of this lien is therefore of small practical importance, *first* because it involves only a negligible part either of the bituminous coal mining industry as a whole or of the field tributary to the Hocking Valley, and *second* because the interest itself is of the most remote and contingent character. Such a remote and contingent interest in such a negligible part of an industry is not a combination in restraint of trade or a monopoly under the Anti-Trust Act.

The decisions of this Court are uniform in holding that the Anti-Trust Acts are applicable only to such combinations as constitute an *undue* restraint of trade or commerce. It was definitely settled in *The Standard Oil Company of New Jersey et al.* v. *The United States*, 221 U. S. 1, that the "rule of reason" must be applied in construing the provisions of the Sherman Act and that the prohibitions imposed by the Act are directed against the *undue* limitation on competitive conditions caused by certain agreements or combinations, and not against any and all combinations or contracts which might be made concerning trade or commerce.

> *The Standard Oil Company of New Jersey et al.* v. *The United States*, 221 U. S. 1, 58-61, 66.

If the "standard of reason" be applied to the present case, it is at once clear that the facts with reference to existing relationships between the Hocking Valley and appellants presented in the record and relied on by appellants, are utterly insufficient to show conditions which are within the prohibitions of the Anti-Trust Acts. That minor combinations or other relationships are properly disregarded in applying and enforcing the provisions of the Anti-Trust Acts, is definitely settled by recent decisions of this Court.

In *United States* v. *Union Pacific Railroad Company*, 226 U. S. 61, Mr. Justice Day said at p. 88:

> "It is the *scope* of such combinations and *their power to suppress or stifle competition or create monopoly* which determines the applicability of the act." (Italics ours.)

In *Geddes et al.* v. *Anaconda Copper Mining Company et al.*, 254 U. S. 590, this Court held that the evidence

failed to show that the defendants constituted at the beginning of the suit such a combination in monopoly or restraint of interstate or foreign trade in copper as would justify granting an injunction under Section 16 of the Clayton Act, basing such conclusion on the absence of facts showing that the defendants controlled such a considerable part of the copper industry as to constitute a restraint of trade or monopoly in copper production in the United States. At pages 594, 595, the Court said:

> "There is evidence that the total production of copper in the United States and Alaska, in 1899, was 581 million pounds, and of the Anaconda Company one million pounds, (probably an error, 100 million pounds being intended); but the total production of the world at that time is nowhere stated. The production in the United States in 1910, the year before the suit was brought, was 1,086 million pounds, and of this the Butte Camp, in which there were several mines other than those of defendants, produced 288 million pounds, or approximately 22 per cent. Here again there is no statement as to the total production of the world for that year.
>
> "Whatever the fact may have been, it is obvious that from such evidence as this it is not possible to determine to what, if to any substantial extent, the defendants restrained or monopolized the production of copper in the United States, much less in the world."

In *United States* v. *Reading Company et al.*, 253 U. S. 26, where this Court held that the relations between the Reading Company (a holding company), the Philadelphia & Reading Coal & Iron Company, the Philadelphia & Reading Railroad Company, the Central Railroad Company of New Jersey, and certain other defendants were such as to constitute a violation of the Anti-Trust Act,

and that the combination of these companies must be dissolved, the Government's bill had also sought the dissolution of a certain incidental relationship between the Lehigh Coal & Navigation Company, the Lehigh & Susquehanna Railroad Company and the Central Railroad Company of New Jersey. The facts with reference to this latter relationship and this Court's conclusion thereon are thus summarized in this Court's opinion, beginning at page 54:

> "In 1871 the Navigation Company leased the Lehigh & Susquehanna Railroad, which it owned, to the Central Railroad Company, by an instrument containing a covenant which the Government claims requires the Navigation Company to ship to market over the leased line three-fourths of all of the coal which it should produce in the future. This covenant has been amended and supplemented by several agreements but not so as to essentially modify it with respect to the contention we are to consider.
>
> "It is argued that this covenant necessarily imposed an undue restriction upon the Navigation Company in selecting its markets and in shipping its coal, in violation of the Anti-Trust Act.
>
> "It is not entirely clear that the covenant will bear the restrictive interpretation as to shipments which the Government puts upon it, but, assuming that it may be so interpreted, nevertheless, the conditions and circumstances of the case considered, the result contended for cannot be allowed.
>
> "When the lease was made, in 1871, the Central Railroad extended from Jersey City to its western terminus at Phillipsburg, New Jersey, and it was without access to the coal fields. The Lehigh and Susquehanna Railroad was about 100 miles in length and extended from Phillipsburg into the Wyoming field, where the Navigation Company owned extensive coal producing properties and mines. The lines of the two companies were

> in no sense competitive, but, on the contrary, the Lehigh and Susquehanna line served as a natural extension of the Central Company's lines to the great tonnage producing coal districts. The rental to be paid was one-third of the gross earnings of the railroad and it was natural and 'normal' that the lessor should desire that the traffic should continue to be as large as possible. Plainly this covenant was not written with the purpose of suppressing interstate commerce and the history of its operation shows that, instead of suppressing it, it has greatly promoted it. The claim is quite too insubstantial to be entertained and the decree of the District Court with respect to it will be affirmed and the bill, as to it, dismissed."

In *United States* v. *Southern Pacific Company et al.*, 259 U. S. 214, where this Court held that the acquisition by the Southern Pacific Company of a controlling interest in the stock of the Central Pacific Railway Company, a normally competing road, constituted a combination made unlawful by the Sherman Act, there was a mortgage of the Central Pacific Railway Company secured by its property and guaranteed by the Southern Pacific Company which subordinated its lease of the Central Pacific properties thereto, with reference to which the Court said on page 241:

> "We direct that a decree be entered severing the control by the Southern Pacific of the Central Pacific by stock ownership or by lease. But, in accomplishing this purpose, so far as compatible therewith, the mortgage lien asserted in the brief filed for the Central Union Trust Company shall be protected."

These authorities establish that remote and inconsequential combinations or relationships are not within the inhibitions of the Anti-Trust Act.

Appellants, however, strenuously contend that under the authority of this Court's decision in *Continental Insurance Company et al.* v. *United States, Reading Company, et al.*, 259 U. S. 156, the Court below should have ordered a dissolution of the existing relationships between the Hocking Valley and the appellants. They say, on page 26 of their Brief: "All the elements in the *Continental Co.* case that required dissolution of the combination there existing, obtain in the present case." This Court has well expressed the dangers inherent in following too meticulously decisions based on superficially similar facts and circumstances in applying the Sherman Act to a particular set of facts.

> " . . . each case under the Sherman Act must stand upon its own facts, and we are unable to regard the decrees in the *Northern Securities Company* case and the *Standard Oil Company* case, as precedents to be followed now, in view of the different situation presented for consideration." (*United States* v. *Union Pacific Railroad Company*, 226 U. S. 470, 474).

In the light of the warning by this Court, just quoted, we now examine with some care the situation before the Court in the *Continental Insurance Company* case. The magnitude of the properties covered by the general mortgage of the Reading Company and the Philadelphia & Reading Coal & Iron Company, especially when considered in relation to the total amount of anthracite coal producing properties in the United States, presents a striking contrast to the small amount of bituminous coal properties involved in the present case. That this Court fully appreciated the importance of the comparative size

of the properties with which it was dealing in the *Continental Insurance Company* case, is shown by the facts to which it referred in its earlier opinion in *United States* v. *Reading Company et al.*, 253 U. S. 26. Among these facts were the following:

(1) Practically all of the anthracite coal in United States is found in northeastern Pennsylvania in three fields, viz.: the Wyoming field, containing about 176 square miles of coal; the Lehigh field, containing about 45 square miles; and the Schuylkill field, containing about 263 square miles of coal.

(2) The Schuylkill field has only two direct rail connections with the two great coal marketing centers, Philadelphia and New York, viz.: The Reading and the Pennsylvania Railroads.

(3) By 1891, in pursuance of its policy of attempting to gain control of the anthracite tonnage of the Schuylkill field, the Philadelphia & Reading Coal & Iron Company (the company whose properties were ordered withdrawn from the lien of the general mortgage in the *Continental Co.* case) owned coal lands comprising about 33 per cent. of the entire anthracite coal field of Pennsylvania and which contained over 50 per cent. of the entire anthracite coal deposits in the State remaining unmined.

United States v. *Reading Company et al.*, 253 U. S. 26, 41, 42, 43-44.

These facts disclose an entirely different situation from that presented by the case here under consideration.

The *Reading* case involved a gigantic combination affecting the ownership, production and transportation of fifty per cent. of the anthracite coal reserves of this country. The coal properties involved in the General Mortgage with which this Court dealt in its later decision in the same case (*Continental Insurance Company et al.* v. *United States, Reading Company, et al.*, 259 U. S. 156) constituted one-third of the total security of the General Mortgage (259 U. S. 156, 167) and were a vital and essential part of the financial structure which the mortgage embodied. The relationships attacked in the present instance are quite different. They resemble the minor relationships between the Lehigh Coal & Navigation Company, the Central Railroad of New Jersey and the Lehigh & Susquehanna Railroad Company, which this Court held in the *Reading* case were too inconsequential to be considered. In point of fact they are absolutely and relatively much less important even than the relationships there disregarded.

We may observe also in passing that the *Reading* case certainly affords no precedent for the relief prayed by the appellants in the present case, that is, an entire release of their properties from the mortgage lien and covenants. The obligation of the coal companies in the *Continental Insurance Company* case was preserved to the full extent, the only feature terminated being the *joint* mortgage and the *joint* liability on the bonds for which there were substituted several liabilities of the railroad company and the coal company, with adequate provisions for the protection of the bondholders secured by the mortgage.

In the *Continental Insurance Company* case, this Court expressly declared its disinclination to

> "vary the security of the bondholders more than seems necessary to effect fully the purpose of the law."
>
> *Continental Insurance Company* v. *United States, Reading Company, et al.*, 259 U. S. 156, 173.

We respectfully submit that in effecting fully the purpose of the Anti-Trust Law with respect to the combination condemned by the decree of March 14, 1914, there is no necessity of withdrawing from the lien of the consolidated mortgage or from the royalty provisions thereof the insignificant acreage of the Buckeye lands.

(b) APPELLANTS' CLAIM THAT THE MORTGAGE LIEN AND THE ROYALTY COVENANT CONSTITUTE INDUCEMENTS TO DISCRIMINATION IN APPELLANTS' FAVOR IS FRIVOLOUS, AND IN ANY EVENT CANNOT BE URGED BY APPELLANTS AS A BASIS FOR INJUNCTIVE RELIEF UNDER THE ANTI-TRUST ACT.

Appellants assert in their petition (R., 10) that the existence of the 2 cent royalty covenant and the mortgage lien constitute a strong inducement to the Hocking Valley to discriminate in appellants' favor by furnishing better service to the Buckeye mines than to other mines situated along its railroad, and that this relationship should be terminated in order to remove the danger of such discrimination. We think the Court will not be impressed by this argument. It is, in substance, that this Court should relieve appellants from obligations which they have deliberately assumed and which, as we show

hereafter, (pp. 50-58) constituted the principal consideration for the conveyance of the Buckeye properties to that company, in order that appellants may not yield to the temptation to accept discriminations, the receipt of which, they argue, would be unlawful and would tend to establish a combination and monopoly in violation of the Anti-Trust Acts. We submit that it does not lie in the mouths of appellants thus to plead their own susceptibility to unlawful inducements as a justification for the release to them, without consideration or upon inadequate consideration, of the valuable Buckeye property. Surely the public interest does not require this sacrifice of the bondholders' security to the appellants' frailty. The public is adequately protected by Federal and State laws which forbid, and provide for the punishment of, such discrimination, should it ever occur.

Besides, the appellants' petition (R., 11) prays

> "that proper orders may be entered in this cause, *enjoining* any demand or collection of said two cents per ton mentioned in said Section 9 of Article 2 of said mortgage." (Italics ours.)

Such injunctive relief could not be sought by appellants in a separate proceeding for such an injunction under the Anti-Trust Act. Section 16 of the Clayton Anti-Trust Act, 38 Stat. L. 730, provides:

> "That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision or other jurisdiction of the Interstate Commerce Commission."

Discrimination by common carriers in favor of shippers is one of the matters with respect to which jurisdiction is given to the Interstate Commerce Commission.

> *Interstate Commerce Act, Section 1, paragraph 14; Section 3, paragraph 2; Section 4; Section 6, paragraphs 3 and 10; Section 9; Section 12, paragraph 1.*

See also

> *Elkins Act, 34 Stat. L. 584, Section 1.*

The appellants' present petition is, in substance and effect, an attempt themselves to bring suit for an injunction in respect of a situation which they claim will result in unlawful discriminations or preferences in their own favor as shippers. Section 16 of the Clayton Anti-Trust Act, above quoted, would seem to forbid their prosecuting any such suit and, we respectfully insist, likewise precludes their seeking similar injunctive relief by an intervening petition in this cause.

(c) THE DECREE OF MARCH 14, 1914 WAS FRAMED TO DISSOLVE ONLY THOSE RELATIONSHIPS WHICH OPERATED TO CREATE A MONOPOLY OR RESULTED IN UNDUE RESTRAINT OF TRADE AND THAT DECREE DID NOT REQUIRE OR CONTEMPLATE THE ACTION PRAYED FOR BY THE APPELLANTS.

Appellants also seem to argue (Brief, pp. 8-9, 23-25) that the principle of complete separation of the railroad and coal properties is inherent in the Decree of March 14, 1914, and has therefore so far become the law of this case as to require the cancellation of the 2 cent royalty

covenant and the removal of the lien of the Consolidated Mortgage from the Buckeye lands, even though, if those relationships were now to be examined as an original question, they might not be held to constitute either a combination in restraint of trade or a monopoly. We insist that there is nothing in the relations now existing between the Hocking Valley and the Buckeye which can with any degree of fairness or reasonableness be said to violate either the spirit or the letter of that Decree. It is perfectly clear that the purpose of the Decree was to destroy those conditions and only those conditions which constitute a violation of the Anti-Trust Acts. In its reservation of jurisdiction (quoted *supra*, p. 22) the lower Court retained jurisdiction for the purpose of making

> "such other and further orders and decrees as may be *necessary* to the due execution of this decree *and the complete dissolution of the combination and monopoly herein condemned.*" (Italics ours).

In its opinion refusing to approve the sale of the Buckeye stock to Poston, filed July 30, 1915, the Court said (R., 184; Appellants Brief, 5):

> "We cannot too often repeat that the prime purpose of our decree was to insure the complete separation of the railroad interests from the coal mining interests, *so that the former should not and could not dominate the latter.*" (Italics ours).

We submit that the Court which made that decree is best fitted to interpret and apply it. It has been shown (*supra*, pp. 18-28; 30-31) that that Court has consistently refrained throughout this litigation, and with full knowledge of the mortgage situation, from disturbing the relationships between the Hocking Valley and the Buckeye

property created by the Consolidated Mortgage. It has stated in its opinion on the granting of the order here appealed from, that this relationship is not substantial enough to justify relief under the original decree. It has always treated that relationship as one created and existing primarily and principally for the benefit of the holders of the Consolidated Mortgage bonds, whose interests the Court has at all times been alert to protect. In this it has followed strictly the principles laid down in similar cases by this Court.

Continental Insurance Company et al. v. *United States, Reading Company, et al.*, 259 U. S. 156, 173.

United States v. *Southern Pacific Company et al.*, 259 U. S. 214, 241.

IV.

The Court Below Properly Dismissed Appellants' Petition Because to Have Granted the Relief Therein Prayed Would Have Been Manifestly Inequitable.

We have shown, *first*, that the present appeal must be dismissed because appellants have no standing to prosecute it, *second*, that the Court below properly dismissed appellants' petition inasmuch as that petition sought a modification of a final decree which that Court was without jurisdiction to grant, and, *third*, that the situation disclosed in appellants' petition involved no violation of the Anti-Trust Act or of the final decree of March 14, 1914.

But suppose, for the purpose of the present argument only, we concede (a) appellants' standing to appeal, (b) the jurisdiction of the Court below to grant the requested modification of its previous decree, and (c) that the petition disclosed at least a technical violation of the Anti-Trust Act of which appellants were competent to take advantage in their private interest. Nevertheless, the Court below was clearly right in dismissing the petition because of the inequitable results which would necessarily have followed the granting of appellants' prayer.

(a) APPELLANTS' DEMAND THAT THE BUCKEYE PROPERTY BE RELEASED FROM THE MORTGAGE EITHER FOR NO CONSIDERATION OR FOR AN INADEQUATE CONSIDERATION IS INEQUITABLE.

The opinion of the Court, quoted in full above, said in part:

> "It will be observed that the substantial difference between the petitions of the Coal Companies and the Government, respectively, is that the one asks such release without, and the other upon, compensation to the mortgage trustee. . . . Again, this is a proceeding in equity, and it is manifestly inequitable that either Jones or those standing in his right escape liability for a situation assumed by them, and, as we must find, then recognized as of binding force, and whose assumption seems fairly to have been part of the consideration paid by Jones for the Buckeye stock. In the situation presented, we think the petitioning coal companies cannot be heard to say that payment of the royalty, or the continuance of the mortgage lien upon the lands of the Buckeye Company, would violate the law. The fact that the Government did not answer or take issue upon the coal companies' petition

> cannot alter the result otherwise reached. The petition of the coal companies must be denied" (R., 113-114).

In their brief (pp. 20, 34), appellants take exception to the above characterization of their petition as compared with that of the Government. They seem to contend that the prayer of their petition is not substantially different from the prayer of the Government's supplemental petition of November 21, 1922. Passing over appellants' argument at pages 41 to 43 of their main brief which certainly seems to justify the lower Court's characterization of their purpose, some light is thrown on this question by reference to the prayers of the two petitions and to appellants' answer to the supplemental petition.

The prayer of appellants' petition is as follows:

> "WHEREFORE your petitioners pray that proper orders may be entered in this cause, enjoining any demand or collection of said two cents per ton mentioned in said Section 9 of Article 2 of said mortgage, decreeing that all the lands of said Buckeye Company be released and eliminated from said mortgage and particularly from said Section 9 thereof, or that all interest or interests of said railway company and said trust company in said property be sold or such other and appropriate order herein as will effectively carry out the purpose and effect of the main decree entered herein" (R., 11).

The prayer of the Government's petition, so far as material, is as follows:

> "2. That defendants, The Hocking Valley Railway Company and The Central Union Trust Company of New York, trustees, be required to release the above described coal lands from the

> lien of said Hocking Valley first consolidated mortgage, and to release The Buckeye Coal & Railway Company from its obligations under Section 9 of said mortgage upon payment by said Buckeye Company, or its successors in interest to The Central Union Trust Company of the reasonable value of the rights of said trustee thus to be relinquished" (R., 71).

Appellants' answer to the Government's petition contains the following:

> "10. These respondents, however, insist that relief should be granted upon the two petitions now before the court according to the prayer of the petition of these respondents, and not according to the prayer of the supplemental petition filed by complainant. The relief prayed for in said petition of respondents is in strict accord and harmony with the main decree entered in this cause, and with all subsequent proceedings in this cause. The prayer of complainant's said supplemental petition asks that this court change its theory of this whole case, and asks that these respondents now pay for the total value of said Buckeye Company lands and also the two-cent royalty upon the indebtedness to secure which said mortgage was given to the Central Union Trust Company" (R., 75-76).

The same claim is elaborated in the paragraph of the answer which follows the passage just quoted (R., 76).

It is apparent from the foregoing that appellants themselves recognize a very substantial difference between the prayer of the Government and their own prayer, and that the thing to which they took exception in the relief asked by the Government was the fact that it contemplated that the mortgage trustee should be reasonably compensated for the security with which it was to be required to part. We leave it to counsel for ap-

pellants to explain whether the ground of their objection to the Government's petition was the fact that it provided for *adequate* compensation or the fact that it provided for any compensation *at all.* For the purpose of our present argument, it is immaterial whether appellants sought to compel the release of the mortgage security for an inadequate consideration or for no consideration whatever. Either result would be inequitable and contrary to the settled rule of this Court.

Continental Insurance Company et al. v. *United States, Reading Company, et al.*, 259 U. S. 156, at p. 173;
United States v. *Southern Pacific Company*, 259 U. S. 214, at p. 241.

(b) THE PROVISIONS OF THE CONSOLIDATED MORTGAGE WHICH APPELLANTS ATTACK MERELY PROVIDE FOR, AND SECURE PAYMENT BY THE BUCKEYE AND ITS SUCCESSORS OF, THE PORTION NOT INITIALLY PAID BY IT OF THE PURCHASE PRICE OF ITS PROPERTIES.

The Buckeye acquired its properties at the time, and as a part, of the Hocking Valley Reorganization of 1899 (R., 170-171). That reorganization was the outgrowth of the insolvency and receivership of the Columbus, Hocking Valley & Toledo Railway Company. The receivership, originating in a general creditors' suit, was continued in connection with foreclosure suits upon three mortgages: (1) a joint mortgage of the Columbus, Hocking Valley & Toledo Railway Company and the Hocking Coal & Railroad Company, dated October 1, 1881, and securing an issue of Five Per Cent. Bonds, executed by the Railway Company only; (2) a joint mortgage,

dated August 1, 1884, by said two companies to secure an issue of Six Per Cent. Joint Bonds of both companies, and (3) a mortgage, dated October 1, 1896, executed, and securing bonds issued, by the Railway Company only (R., 13, 233). All three mortgages were in default and were foreclosed or cut off in the proceeding reported in 87 Fed. 815, under the title "*Central Trust Co. of New York* v. *Columbus, H. V. & T. Ry. Co., et al.*" (R., 222-242). The opinion of Circuit Judge Lurton, later a member of this Court (R., 222-242), decided, among other things, that the two joint mortgages were not *ultra vires* the coal companies. The decree of foreclosure and sale entered May 24, 1898 (R., 242), declared that the mortgage of October 1, 1881, was a valid and subsisting mortgage and directed the sale of mortgaged properties. The properties of the Coal Company so ordered to be sold were the same as those of the Buckeye included in the First Consolidated Mortgage of the Hocking Valley and the Buckeye, dated March 1, 1889 (R., 242). The decree of May 24, 1898, fixed an upset price upon the railway properties of $3,250,000 and upon the coal property of $750,000, if offered as separate parcels, and an upset price upon the two properties, if offered as one parcel, of $4,000,000.

The two properties were purchased as one parcel by Melville E. Ingalls, Jr., and George E. Gardiner, for $4,000,001 and the sale was duly confirmed. Ingalls and Gardiner, of course, acted for the creditors in making this purchase, and it was made as a step in the Reorganization. As a further step a new coal company, the Buckeye, and a new railroad company, the Hocking

Valley, were organized (R., 169, 171). Thereupon, under date of February 25, 1889, Ingalls and Gardiner offered to convey to the Buckeye the coal lands and other property purchased by them under the foreclosure decree, in consideration of the payment by the Buckeye of $25,000 in cash and of the delivery by it of 2,250 full paid shares of its capital stock. This offer (R., 53-55) also contained, among others, the following provisions:

> ". . . it being understood that . . . your company will fully carry out in all respects a certain plan and agreement for the reorganization of the Columbus, Hocking Valley and Toledo Railroad Company, dated January 4, 1899, to which reference is hereby made; and as a special consideration for said conveyance and transfer that your company will mortgage its said lands and appurtenances hereby agreed to be conveyed to it by us as security for the bonds of The Hocking Railway Company to be issued under said plan."

The Buckeye duly accepted this offer (R., 55-56), signed a formal contract agreeing to join in the new mortgage of the Hocking Valley (R., 45-48) and signed and accepted a deed incorporating the same provisions (R., 48-53). Property for which the purchasers or their constituents had paid approximately $750,000 was thus immediately conveyed to the Buckeye for $25,000 in cash and $225,000 in stock and in consideration of the covenant to mortgage. The discrepancy between the cost to the purchasers and the consideration received in cash and stock must have been supplied by the agreement to mortgage. The facts admit of no other explanation.

Under date of March 1, 1899, the Buckeye joined with the Hocking Valley in executing the First Consolidated

Mortgage to Central Trust Company as Trustee, securing an authorized issue of $20,000,000 of First Consolidated Mortgage 4½% bonds. These bonds were signed only by the Hocking Valley. The mortgage recited the acquisition by the Buckeye of the properties conveyed by the deed of February 25, 1899, the resolutions of the Buckeye stockholders and directors authorizing the execution of the mortgage substantially in the form submitted at their respective meetings, and that the mortgage itself was substantially of the tenor of the drafts submitted to and approved by the stockholders and directors of both the Hocking Valley and the Buckeye (R., 15-17). Section 9 of Article Two of the mortgage contains the following provisions:

> "Sec. 9. On July 1st, 1900, and on or before July 1st, in each and every year thereafter, the Coal Company shall deliver to the Trustee a statement in writing showing the amount of coal mined from lands owned by the coal company and mortgaged hereunder, during the year ending with the 1st day of March next preceding the date of such statement, and simultaneously it shall pay to the trustee hereunder a sum equal to two cents per ton on all coal so mined during such next preceding year.
>
> "All sums so received by the trustee shall by it be used and applied in purchasing bonds hereby secured, in such manner as to it shall seem best, and at such prices as it shall seem best, not exceeding the rate of one hundred and five per centum and accrued interest. All such bonds when so purchased shall be cancelled. All sums so received by the trustee and not by it so used within six months from its receipt thereof, shall be returned to the coal company." (R., 8-9.)

The following facts make it clear why this Sinking Fund provision was inserted and why it fixed the amount to be paid at 2 cents per ton: The coal lands acquired and originally mortgaged by the Buckeye comprised 10,015.51 acres (R., 53). This acreage was about seven-eighths of that owned on June 7, 1923 (R., 248). Prior to Jones' purchase of the Buckeye stock, $134,000 of bonds were retired by the sinking fund (R., 198, 102). An approximate estimate of the unmined tonnage in the original Buckeye lands on March 1, 1899, is readily made as follows:

Tonnage mined before 1916 $\frac{134,000}{.02}$ =	6,700,000	Tons
Tonnage mined 1916-1923 (R., 249).....	3,741,187	"
Tonnage unmined as of June 7, 1923 (R., 248)	18,662,375	"
	29,103,562	
Less ⅛ account tonnage contained in property acquired after March 1, 1899	3,637,945	
Unmined tonnage as of March 1, 1899....	25,465,617	

Royalty at $.02 per ton on which would yield $509,312.34.

We think the reason for the incorporation of the 2 cent royalty provision is now reasonably evident. It was designed to refund to the Consolidated Mortgage the approximate amount of the purchase price of the Buckeye properties over and above the amount paid in cash and in capital stock, *i. e.*, $500,000. We may further assume that the Buckeye stock (all of which the Central Trust received as Trustee, R., 192-195) was supposed to represent the approximate residual value of the surface lands and that the Sinking Fund provision was designed

to take care of the exhaustible elements in the value of the security represented by the coal in the ground. Whether this process of reasoning was actually pursued by the purchasers and the organizers of the Buckeye Company, we have no means of knowing. But the fact is clear beyond controversy that the amount which the Buckeye would be required to pay under the Sinking Fund provision was approximately the actual cost to the Purchasing Committee, in excess of the stock and cash received, of the lands which the Committee conveyed to the Buckeye. This portion of the purchase price was charged upon the land and was to be paid only as realized when the coal was removed. Pending payment the mortgage lien was security that payment would be made.

The Buckeye duly observed its obligations up to and including part of the year 1916 (R., 248), and the Sinking Fund had provided for the retirement, over this period, of $134,000 of bonds. In other words, the process of payment for its lands by the Buckeye had proceeded, up to that time, as contemplated by the mortgage. It then became necessary for the Hocking Valley and the Central Trust, under the orders of the Court below, to dispose of the Buckeye stock and of the Ohio Land & Railway securities which constituted a part of the mortgage security. To this end the contract with Jones, dated October 7, 1916, was entered into. That contract recited:

> "(c) The Hocking Company heretofore acquired all said outstanding stock and bonds of the Ohio Company, and all said outstanding stock of the Buckeye Company, and thereupon duly pledged and deposited the same (except five shares of

stock of each said Companies held by directors thereof) under the First Consolidated Mortgage, dated March 1, 1899, made by the Hocking Company and the Buckeye Company to Central Trust Company of New York, Trustee, securing an authorized issue of $20,000,000 of First Consolidated Mortgage Four and One-Half Per Cent. Gold Bonds of the Hocking Company, and said stock and bonds are now deposited with and held by said Trustee under said mortgage. . . .

"(f) By said First Consolidated Mortgage the Buckeye Company conveyed certain real estate in said mortgage described as further security for the payment of said First Consolidated Bonds of the Hocking Company and among other things agreed to pay to said Trustee thereunder a sum equal to two cents per ton on all coal mined from its property so mortgaged, to be applied in purchasing bonds secured by said mortgage" (R., 58-59).

It provided in part:

"Fifth. The Hocking Company and the Chesapeake Company hereby waive and release any and all claims of every character or description against the Buckeye Company, the Ohio Company and the Purchaser or any of them by reason of any liability or claim which might be asserted by the Hocking Company, the Chesapeake Company, or either of them, against the Ohio Company or the Buckeye Company by reason of any matter or thing whatsoever occurring to the date of this agreement; except that *nothing in this Article Fifth, or elsewhere in this Agreement contained is intended or shall be construed in any wise to limit or affect or impair the several covenants or obligations of the Buckeye Company contained in said First Consolidated Mortgage of the Hocking Company, and the Hocking Company and the Chesapeake Company respectively do not hereby waive or release the Buckeye Company, its suc-*

> *cessors or assigns from any such covenants and obligations.* If the Hocking Company at any time defaults in the payments or other obligations imposed on it by said consolidated mortgage, and said mortgage is enforced or foreclosed in any way or to any extent, the Hocking Company agrees that it will cause all the property of the Hocking Company to be first exhausted before any recourse is had under said mortgage to the property of the Buckeye Company and agrees to indemnify and to save and hold harmless said Buckeye Company from any loss or damage to or payment by said Buckeye Company under the provisions of said mortgage, *save only said two cents per ton royalty above-mentioned*" (R., 60-61). (Italics ours.)

When Jones acquired the stock of the Buckeye, he fell heir to its obligations under the mortgage. He did more—he expressly recognized their binding force in his contract. We submit that no court of equity could, for a moment, think of permitting him or his successors to advance any interpretation of that contract, or urge any ground of invalidity thereof or of the mortgage, which would enable him now to retain the benefits and, at the same time, repudiate the burdens of either instrument.

(c) THE APPELLANTS' ARGUMENTS ADVANCED TO JUSTIFY THEIR CLAIM THAT THE MORTGAGE LIEN AND SINKING FUND COVENANTS SHOULD BE TERMINATED ARE FRIVOLOUS.

In their effort to avoid these necessary equitable consequences of the arrangement which Jones entered into, counsel for appellants now advance three arguments:

1. That the 2 cent royalty provision was not specifically referred to in the Plan of Reorganization, nor in the

purchasers' offer, nor in the contract and deed made pursuant thereto, nor in the resolutions of the Buckeye stockholders and directors, and that therefore the Sinking Fund was probably inserted in the mortgage subsequently to these proceedings and was an after-thought (Appellants' Brief, 29-31).

2. That at the time it accepted the purchasers' offer and joined in the agreement and deed and executed the mortgage, the Buckeye was controlled and dominated by the Hocking Valley and was therefore compelled to enter into the contract without any exercise of independent judgment by its officers (Appellants' Brief, 9, 41).

3. That at the time he entered into the contract of October 7, 1916, Jones believed the mortgage lien and the royalty provision of the mortgage to be invalid, both for the reasons just mentioned and because of inherent illegality, and that the language above quoted from the contract of October 7, 1916, was intended to reserve these questions of invalidity as open questions to be determined later in such manner as might seem best (Appellants' Brief, 10-11, 19, 35).

The frivolous nature of these arguments we now proceed to point out.

1. The offer of the purchasers, and the agreement and deed entered into by the Buckeye with the purchasers pursuant thereto, did not undertake to define any of the terms of the proposed mortgage. The provision in the offer read merely as follows:

> "It being understood . . . and as a special consideration for said conveyance and transfer that

> your company will mortgage its said lands and appurtenances hereby agreed to be conveyed to it by us as security for the bonds of The Hocking Railway Company to be issued under said plan" (R., 54-55).

The agreement and deed provide as follows:

> "When and as requested by the Purchasers or by their assigns (eitner individual or corporate), by them from time to time designated, the Company (the Buckeye) will make, execute, and deliver, or will join with the Purchasers or their assigns in making, executing and delivering a mortgage or deed of trust, granting, conveying and pledging said real estate, lands and tenements and the rents, issues and profits thereof, as security for the payment of the bonds issued or to be issued by the purchasers or their assigns for the agreed principal sum of twenty million dollars ($20,000,000)," etc. (R., 46, 49).

Under these covenants any mortgage of the railroad and coal properties, containing usual and customary provisions proper for the security of the bonds, might be tendered by the purchasers or their assigns and the Buckeye would thereupon be obligated, by the express terms of its agreements and by the conditions of the deed, to join in the execution thereof. The mortgage, when executed, contained recitals that at a meeting of the stockholders of the Buckeye, held on the 25th day of February 1899, resolutions were adopted by the affirmative vote of all such stockholders, consenting to and approving the execution of an indenture, substantially in the form of the mortgage, as additional security for the bonds of the Hocking Valley thereby secured, and that at a meeting of the Board of Directors of the Buckeye

held on the same day resolutions were adopted authorizing the president and secretary of the company, in its behalf and under its corporate seal, to execute and to deliver to the Central Trust, a mortgage or deed of trust, to be known as the First Consolidated Mortgage, substantially of the tenor of the draft submitted at said meeting, upon the real estate, lands and tenements acquired from the purchasers. Said mortgage further recited that it was substantially of the tenor of the draft thereof submitted to and approved by the stockholders and directors of the Buckeye. These recitals were adopted by the Buckeye when it executed the mortgage under its corporate seal. By such execution they became the representations of the Buckeye to every holder, present or future, of any of the bonds thereby secured and the Buckeye and its successors in interest were estopped thereafter to deny them.

Bronson et al. v. *La Crosse and Milwaukie Railroad Company et al.*, 2 Wall. 283.

Only a few of the provisions of the mortgage are included in the Record, (pp. 215-219) but it is alleged in the answer of the Central Trust Company to the appellants' petition, (R., 30), that the mortgage contained various and sundry other covenants to be performed by the mortgagors, and this allegation is not denied in the reply of the appellants, their denials (R., 42-43) being limited to the effect or meaning of the mortgage and the conclusions to be drawn therefrom. Such provisions, of course, included provisions defining the events upon which foreclosure proceedings or other remedies could

be brought or enforced, provisions for the sale of the mortgaged properties, provisions for the release of properties from the mortgage when no longer necessary for the use of the mortgagor companies, provisions for maintenance and insurance, and all the multitude of other provisions customary in corporate mortgages. None of these various provisions was referred to in the offer of the purchasers or in the agreement and deed executed pursuant thereto. Yet there can be no question that the Buckeye became bound by each and all of them. The provision for the Sinking Fund was of the same nature. Sinking fund provisions are usual, indeed well-nigh universal, in mortgages of coal properties and the appellants' attempt to claim that the incorporation of such a provision in the Consolidated Mortgage involved, in any way, a departure from the intent of the purchasers' offer and of the agreement and deed pursuant thereto, is unworthy of serious consideration.

And even if the argument could plausibly be made that those who originally organized the Buckeye and entered into the agreement and deed under which it acquired its properties were not on notice of, and did not foresee, that a sinking fund provision would be incorporated in the Consolidated Mortgage, this argument is certainly not available to Jones or to anyone who stands in his right. The contract under which he acquired his interest in the Buckeye properties, and with notice of which his successor in interest, the appellant Sunday Creek Coal Company (R., 11, 252), derived its title, specifically referred both to the mortgage lien and to the Sinking Fund provision, and, as we presently show, specifically obligated Jones and his successors to the observance thereof.

2. Appellants' suggestion that the Buckeye was in some way coerced by the Hocking Valley to enter into the mortgage, to the disadvantage of the Buckeye, is equally baseless. The terms of the offer were defined by the purchasers and were made pursuant, not to any direction or request of the Hocking Valley, but to the provisions of the Plan of Reorganization in which both the Hocking Valley and the Buckeye had their origin. Both the Buckeye and the Hocking Valley alike became obligated, by the very terms by which they acquired their properties, to join in the mortgage in the form in which it was proposed to them. The proposal was made by those who had acquired the properties purchased by them to be vested in the two companies organized to carry out the plan, and the obligations arose as an incident to, and a condition of, the conveyance to those companies of their respective properties. The creditors who effected the reorganization and who had acquired the properties had an absolute right to determine the terms upon which these properties were to be vested in the resulting corporations. Neither company was an instrument of the other. Both were instrumentalities created for the purpose of carrying out the reorganization. Their properties were vested in them upon terms and conditions prescribed by those who had the sole right to prescribe such terms and conditions. The consideration given by the Hocking Valley for its properties was the execution of the Consolidated Mortgage, the issue of bonds thereunder, the issue of other securities provided by the plan and the assumption of the obligations imposed upon the property vested in it by the Court directing the foreclosure. The consideration given by the Buckeye

consisted of 2,250 shares of its capital stock and $25,000 in cash and the assumption of the obligations provided by the foreclosure decree and by the Consolidated Mortgage. These were the conditions upon which it acquired its property and they were the conditions with which it must comply if it was to retain title thereto. They were not imposed by the Hocking Valley, and they inured to the benefit of the bondholders who, or their predecessors in interest, purchased the coal and railway properties and who were entitled to fix the terms on which those properties were disposed of.

3. Most specious of all is the remarkable claim advanced by appellants that the effect of the contract of October 7, 1916 was to reserve, as between Jones and the other parties to that contract, the question whether the Buckeye was bound by the mortgage lien and by the 2 cents per ton royalty provision. The Court need only read the contract provisions above quoted to see that what appellants say is not so. The contract recites that the Buckeye mortgaged certain real estate as further security for the payment of the First Consolidated Bonds of the Hocking Valley and agreed to pay to the mortgage trustee 2 cents per ton on all coal mined from its property so mortgaged. Article Fifth of Jones' contract contains a release of liabilities which might be asserted by the railroads against the Ohio Company or the Buckeye Company

> "except that nothing in this Article Fifth or elsewhere in this Agreement contained is intended or shall be construed in any wise to limit or affect or impair the several covenants or obligations of the Buckeye Company contained in the First Consoli-

dated Mortgage of the Hocking Company" (R., 60-61)

and provides that the railroads did not release the Buckeye, its successors or assigns, from any such covenants or obligations. There is also an indemnity against foreclosure and against loss or damage under the mortgage "save only said two cents per ton royalty above mentioned."

The contract and its recitals bind Jones and his successors as well as the railroads. The contract suggests no doubt or question as to the absolute obligation of the Buckeye to comply with the mortgage, including the Sinking Fund provision. On the contrary, language could not more clearly indicate the plain intention of the parties that the mortgage covenants, and specifically the Sinking Fund provision, were to be observed and complied with by the Buckeye. The indemnity against foreclosure merely recognized the principle of marshalling assets which the courts would apply in the absence of the indemnity clause. Under the contract Jones became the sole stockholder of the Buckeye. He later organized and became sole stockholder of the Sunday Creek Coal Company (of Ohio), the other appellant herein, to which the Buckeye stock and properties were alike transferred (R., 249-253). Jones' obligations thus became and are the obligations of the Sunday Creek Coal Company. It would be highly inequitable to allow him or these instrumentalities of his now to repudiate them.

Besides, appellants have already undertaken to litigate their liability under the mortgage and under the Sinking Fund provision thereof. The outcome of that litigation is in evidence in the form of a certified copy of

the record in *Buckeye Coal & Railway Company* v. *Central Union Trust Company of New York, et al.*, abstracted in the present Record (R., 246-247). Appellants have formally admitted (R., 249) for the purpose of this appeal that in said cause there was an issue between appellants and appellees as to the validity of the First Consolidated Mortgage and the covenants of the Buckeye therein "including the matters and things now set up in respect thereof in the petition of the appellants herein filed December 6, 1921." The Court of Common Pleas of Perry County, Ohio, and later the Court of Appeals of said County, after trials upon the merits, ordered, adjudged and decreed that the First Consolidated Mortgage and the covenants of the Buckeye therein contained were valid and binding obligations and a good and valid lien upon the real property in the mortgage described. The Supreme Court of Ohio declined to review that record. That decision is *res adjudicata* of appellants' present contentions as to the invalidity, as between the appellants and the Hocking Valley and Central Trust, of the mortgage lien and of the mortgage covenants.

(d) THE PURCHASE PRICE PAID BY JONES FOR THE BUCKEYE STOCK WAS OBVIOUSLY FIXED IN CONSIDERATION OF THE EXISTENCE OF THE MORTGAGE LIEN.

The purchase price paid by Jones under the contract of October 7, 1916 for the Buckeye stock was $50,000. The sale of the stock at this price was approved by the Court below (R., 212-213). Its order found

> "that the terms of the contract of sale are, and the amount of cash paid for said securities is, such as to fully protect the interests of Central Trust

> Company of New York, Trustee, and that the price proposed to be paid for said properties is the reasonable value thereof."

It is beyond the bounds of reason to suppose that this nominal purchase price was fixed by the parties or was approved by the Court except in the light of the fact that Central Trust, as Trustee, retained its lien upon the Buckeye properties and the benefit of the royalty provision.

Appellants pretend in their brief (Appellants' Brief, 7, 45) that the purchase price was small because the Buckeye property was encumbered by a lease to the Sunday Creek Coal Company (formerly Sunday Creek Company). That lease is not in this Record and the Court will not speculate as to its terms. Such lease may as well have been an additional element of value to the stock as the contrary. As it was held by the Sunday Creek Coal Company, all of whose stock was owned by Jones, the purchaser of the Buckeye stock (R., 252), the circumstance of the lease could not have worried Jones seriously. Anyway, it is alleged in the answers of the Hocking Valley and the Central Trust (R., 80, 96), and is nowhere denied, that said lease was forfeited in 1916, the year in which the contract with Jones was made.

(e) THE APPELLANTS' UNCONSCIONABLE CLAIM WAS CORRECTLY CHARACTERIZED BY THE COURT BELOW.

Stripped of verbiage and sophistry, appellants' purpose is perfectly clear. Appellants acquired the Buckeye properties subject to an obligation to refund to the trustee for the bondholders, who had purchased and vested those properties in the Buckeye, the approximate amount

of the unpaid balance of the actual cost thereof to the bondholders. The time of payment of this unpaid balance was deferred until the Buckeye and its successors could realize, out of the coal in the properties, amounts sufficient to discharge it. Appellants now seek to repudiate that obligation and to violate the terms of the grant under which they hold, while still retaining its benefits. They affect to believe that for $50,000 their *alter ego*, Jones, acquired an unencumbered title to 11,000 acres of land containing 18,500,000 tons of unmined coal. They have sought to carry their unconscionable claim first into the Ohio State Courts and, failing there, before the Circuit Judges in the anti-trust case. In each instance their claim has been denied in terms which leave no doubt of the opinion of these courts as to its inequitable character. They now, upon the pretext of protecting the public interest, seek to bring the question before this Court, in which, as we have shown, they have no standing. Their efforts are correctly characterized by the Court below in the extract from its opinion which we quote at the head of this Point IV of our argument (*supra*, p. 48). We repeat it here:

> ". . . this is a proceeding in equity, and it is manifestly inequitable that either Jones or those standing in his right escape liability for a situation assumed by them, and, as we must find, then recognized as of binding force, and whose assumption seems fairly to have been part of the consideration paid by Jones for the Buckeye stock. In the situation presented, we think the petitioning coal companies cannot be heard to say that payment of the royalty, or the continuance of the mortgage lien upon the lands of the Buckeye Company, would violate the law."

V.

The Appeal Should be Dismissed or the Order Appealed From Affirmed.

Respectfully submitted,

JOHN F. WILSON,
Solicitor and Counsel for Appellee,
The Hocking Valley Railway Company.

JOHN F. WILSON,
A. C. REARICK,
PAUL SMITH,
of Counsel.

New York, April, 1925.

IN THE

Supreme Court of the United States

OCTOBER TERM, 192[illegible] 1925

No. 368.

51

THE BUCKEYE COAL & RAILWAY COMPANY, *et al.*,
Appellants,

vs.

THE HOCKING VALLEY RAILWAY COMPANY, CENTRAL UNION TRUST COMPANY OF NEW YORK, THE UNITED STATES OF AMERICA,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

Brief for Appellee Central Union Trust Company of New York.

ARTHUR H. VAN BRUNT,
Solicitor for Appellee,
Central Union Trust Company of New York.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

BRIEF FOR APPELLEE CENTRAL UNION TRUST COMPANY OF NEW YORK.

Statement.

The facts are so fully stated in the brief of our co-appellee, The Hocking Valley Railway Company (hereinafter called The Hocking Valley Company), as to preclude the necessity for any amplification thereof in the present brief. Reference is therefore made to the statement of the facts as set forth in the brief of The Hocking Valley Company on the present appeal.

ARGUMENT.

I.

The Appellants Are Without Standing to Prosecute an Appeal to This Court and the Appeal Should Therefore Be Dismissed.

On this point we call attention to the argument presented on the motion to dismiss the appeal in the brief heretofore filed by the appellees, Central Union Trust Company of New York (hereinafter sometimes called the Trust Company) and The Hocking Valley Company. This argument is so fully stated in the brief of The Hocking Valley Company on the present appeal that no elaboration thereof is deemed requisite. We refer to the argument under Point I of The Hocking Valley Company's brief and authorities cited and adopt the same as a full and complete statement of our own position with respect to the matters there treated.

II.

The Court Below Properly Dismissed Appellants' Petition Because It Sought a Modification of a Final Decree Which the Court Was Without Jurisdiction to Grant.

The Court when it made the original decree and the order of May 19, 1916, had before it the entire situation, and on this it approved the sale of the Buckeye Company stock to Jones, apparently believing that there was no substantial interference with free competition involved in the situation thus created (Rec., p. 113).

The Court below on the present application inclined to the view that the order of May 19, 1916, and the sale of the Buckeye Company stock thereunder

> "exhausted the jurisdiction of this court over the specific question whether the situation created by the lien of the Hocking Valley mortgage upon the Buckeye Company's lands, given to secure the Railroad's indebtedness, in connection with the tonnage royalty provision, was so far unlawful as to require its elimination (Rec., p. 113)."

The action of the Court rendering the order of May 19, 1916, and the confirmation of the sale pursuant thereto, when considered in connection with the previous decree and series of orders, and the five-year period during which the last of these orders remained unchallenged, constituted a final adjudication, and should bar successful maintenance of the present proceeding.

The facts, argument, and authorities are set forth in greater detail under Point II of the brief of The Hocking Valley Company on the present appeal to which reference is hereby made.

III.

The Court Below Properly Dismissed Appellants' Petition Because the Situation Therein Disclosed Involved No Violation of the Anti-Trust Act or of that Court's Final Decree.

In addition to the argument and authorities outlined under Point III of the brief of The Hocking Valley Company to which reference is hereby made, the Court's attention is called to the following:

Scope and Effect of Opinion and Decree.

On page 18 and again on page 23 of their brief the appellants contend that under the original decree in this

matter the entire combination of the railroad and coal properties pursuant to the reorganization scheme of January 4, 1899, is illegal and fraudulent. Under this premise the appellants argue that to give full force and effect to such opinion and decree and under the authority of the case of *Continental Company* v. *U. S.*, 259 U. S. 156, it is necessary to nullify the lien of the Mortgage upon the coal lands of the Buckeye Company and its provisions with respect to the two-cent royalty.

The fallacy of the foregoing argument may be perceived from analysis of the original opinion and decree hereunder and the subsequent history of the case, and from consideration of the true meaning of the *Continental* decision.

Trust Company not a Party when Opinion was Rendered.

The Central Union Trust Company (then Central Trust Company) was not a party to the action when the opinion of December 28, 1912 was handed down (Rec., p. 117).

Between that date and March 14, 1914, the date of the entry of the decree, the Trust Company as Trustee of the First Consolidated Mortgage of The Hocking Valley Railway Company and as Trustee under the agreement of April 30, 1908, was made a party (Rec., p. 166).

Therefore, while the Trust Company was a party to the decree it was not a party to the cause at the time when the original *opinion* was entered. It is therefore clear that any statements in the original opinion with respect to the entire separation of the coal and railway properties should be so construed as to preserve—in so far as consistent with the directions of the decree—the rights of the Trustee and of the bondholders whom it represents.

The true construction of the original opinion and decree as more fully explained below would seem to re-

quire separation of the coal and railway properties only to the extent legitimately required to prevent violation of public policy or the Sherman Anti-Trust Act.

The *Continental* case, *supra*, does not require the Court either to declare void the two-cent royalty provision or the lien of the mortgage upon the lands of the Coal Companies, nor does it require a sale of such properties in order to effectuate the complete separation contemplated by public policy and the Sherman Anti-Trust Act.

At most, the *Continental* case stands merely for the proposition that the Court has power to free properties from the consolidation tendency of a mortgage by relieving them from the lien and substituting a judicially ascertained equivalent in protection of the bondholders.

The doctrine of the *Continental* case does not require the exercise of such power, where not reasonably required to prevent violation of public policy or the Sherman Anti-Trust Act.

This is made clear by the Court in the *Continental* case, when it says on page 173:

> "We have no desire to vary the security of the bondholders more than seems necessary to effect fully the purpose of the law. * * *"

In other words, under the doctrine of the *Continental* case, the Court may have power to declare the two-cent royalty provision void, and also to declare void or inoperative the lien of the mortgage upon the coal lands. But even though it has power to do the foregoing, it is nevertheless discretionary with the Court whether or not it will exercise such power. Because of the secondary nature of its security and the consequent lack of direct interest of The Hocking Valley Company in the aforesaid rights and properties, it seems clear, as the Court below decided, that neither public policy nor the Sherman Anti-Trust Act requires such separation as is de-

manded by the petition of appellants in the case at bar. In the proper exercise of its discretion, the Court rendering the original opinion of December 28, 1912, had not called for separation to the extent demanded by the appellants, and the Court in the present proceeding is not obligated either by the original decree or by the doctrine of the *Continental* case to compel such separation as is contended for by the appellants.

Though the nature of the pledged securities and the scope of The Hocking Valley mortgage were fully before the Court when it rendered the original opinion and decree herein, yet so far as disposition of the stocks pledged with the Trust Company was concerned, the decree in terms only ordered a sale of stock of the Sunday Creek Company. In fact the Trust Company had been brought into the case simply because all this security had been pledged to it and was in its possession (Rec., p. 166).

It was not until 1915 that the Government filed its supplemental petition for the sale free and clear of the mortgage of certain other securities (including the Buckeye stock) owned by The Hocking Valley Company and pledged to the Trust Company (Rec., p. 189).

In its answer to this petition the Trust Company set up that the securities had been validly pledged to it and it held the same solely as Trustee for the bondholders, none of whom were identified with the management or control of The Hocking Valley Company. It further claimed that there was no power reserved in the original decree to order the sale of other securities (Rec., pp. 194-201).

The proofs established the fact that the bondholders had no voice in the management of The Hocking Valley Company, and that pledges of the stock under the mortgage and trust agreement were validly made, but the Court held that such a pledge of securities was subject to the right to have the same relieved therefrom, provided

the pledge-holding thereof was in violation of the Sherman Anti-Trust Act, and provided payment was made to the Trustee for the benefit of the bondholders of the judicially ascertained equivalent of the securities released.

From that decree the Trust Company appealed to this Court. While such appeal was pending The Hocking Valley Company entered into negotiations with John H. Jones for the sale of the securities in question, resulting in a contract between them. The Trust Company was not a party to this contract, nor had it any connection therewith (Rec., pp. 57-62).

On October 5, 1916, The Hocking Valley Company filed its petition for an order approving said Jones as purchaser, and for the approval of the terms of the contract of sale. In that petition The Hocking Valley Company pointed out that the contract provided for due application to the Trust Company for the release of the pledged securities, and stated that if application in accordance with the provisions of the trust mortgage was thus made, in the event of the approval of the contract and upon the finding by the Court that the price fixed in said contract was the fair and reasonable value of the securities and that no better price could be obtained, the Trust Company would be willing to release the securities and to dismiss its pending appeal from the decree directing their sale (Rec., pp. 209-212).

It is evident that this allegation could only be made because of representations made by the Trust Company to The Hocking Valley Company and this constitutes a statement of the position of the Trust Company. In other words, the Trust Company insisted for its protection that the Court itself should pass upon the sufficiency of the amount paid for the securities release of which was sought, and agreed that if the Court, on the evidence before it, found this to be ample, then it (the Trust Com-

pany) would, upon proper application pursuant to the trust mortgage, release the securities in question upon the receipt of the purchase price.

This contract, which was before the Court when it made the order of May 19, 1916 approving the sale of the Buckeye stock, specifically referred to the mortgage on the Buckeye lands and the royalty provisions therein (Rec., p. 111), so that at that time the attention of the Court was clearly called to these factors. It is significant that with the mortgage and its royalty provisions sharply presented, the Court found nothing improper therein and made no reference thereto in its order or opinion. In fact it approved a sale price for the Buckeye stock substantially similar to its appraised value fixed when no question had been raised as to the lien of the mortgage or the validity of the royalty contract (Rec., p. 211).

IV.

The Court Below Properly Dismissed Appellants' Petition Because to Have Granted the Relief Therein Prayed Would Have Been Manifestly Inequitable.

The argument and authorities under Point IV of the brief of The Hocking Valley Company contain a thorough statement of our position with respect to the matters there set forth. In addition to the argument in said brief, to which reference is hereby made, we wish particularly to call the Court's attention to the significance of the price paid by Jones for the Buckeye stock, and to the other matters hereinafter set forth.

The petition of The Hocking Valley Company and Chesapeake & Ohio Railway Company, filed October 5, 1916, shows that the stock of the Buckeye Company had been appraised at $18. a share, or $45,000. in all (Rec.,

p. 211), by appraisers acting for The Hocking Valley Company and the Trust Company. That appraisal was made at a time prior to any challenge of the validity of the mortgage on the Buckeye lands or of the royalty contract contained therein. From the record it appears that in 1923 the Buckeye Company properties contained over 18,000,000 tons of unmined coal (Rec., p. 248). It is clearly apparent, therefore, that the sale of this stock, which was all the stock of the Buckeye Company and carried title to its properties, could only have been approved at such a price because of the lien of The Hocking Valley Company mortgage upon the Buckeye lands and the obligation to the Buckeye Company to pay a royalty of two cents a ton as provided in the mortgage. Unfortunately the record does not contain the full evidence which was given to the Court, but it is inconceivable that this meagre price for land having such a quantity of unmined coal could have been occasioned solely by improvident leases as suggested on pages 45-46 of the appellants' brief.

The conclusion is irresistible, that the price at which this Buckeye stock was sold was fixed because the Buckeye Company and its properties were subject to the lien of The Hocking Valley mortgage and it was liable for royalty payments provided for in the mortgage.

Both of these were mentioned and dealt with in the contract of sale negotiated between Jones and The Hocking Valley Company (Rec., p. 111) and there is no suggestion anywhere in that instrument of the slightest invalidity thereof or that their existence or provisions contravened the Sherman act. Consequently, the Central Union Trust Company, in view of the expressed retention thereof upon the determination of the application to sell to Jones, assumed they were to stand.

The Court had before it the entire situation, knew of the existence of this lien and royalty contract, also was

aware of the fact that the application then being made was in aid and furtherance of the government suit to dissolve this illegal combination, and yet made not the slightest suggestion that the mortgage or royalty contracts were invalid and approved a sales price for the Buckeye stock which was practically the figure at which it had been appraised prior to any challenge of the validity of the mortgage and royalty contracts.

Jones paid Fifty thousand dollars ($50,000.) for the Buckeye stock and took the same over, and then promptly failed to pay the royalties provided for in the mortgage. When the Trustee brought suit for these royalties, he defended on the ground that the contract was invalid and that the lien thereof on the coal lands was in violation of the Sherman act. It was after the beginning of this suit by the Trustee that the Buckeye Company, then and now Jones' creature, brought the State Court action to get rid of the mortgage and the contract on the theory that they were a cloud on the title. The aid of the State Court was probably sought because that looked a more hopeful forum, as the Federal Court had approved the sale without any reservations or modifications in respect to the mortgage or royalty contract though the same had been clearly brought to its attention.

When the State Court action failed, as a last resort the petition was filed which is now before the court. By such procedure it sought to have its lands relieved from the lien of the mortgage and to avoid payment of royalties, and that too, though it paid the Fifty thousand dollars for the stock upon the theory that the Buckeye properties were burdened with this lien and contract. In other words, this was an effort by the Buckeye Company to free its property from a very substantial lien, subject to which the same was purchased, and which was a very important feature in the determination by the Court of the sufficiency of the purchase price.

Attitude of the Government.

The petition of the Buckeye Company was heard in June, 1922, and at the time of that argument the Government took no position whatsoever (Rec., p. 114).

Just about this time this Court decided the *Reading* case, reported as *Continental Ins. Co.* v. *U. S.* (*supra*). The Government in November, 1922, filed its petition, praying for relief if the Court found such holding to be in violation of the Sherman Anti-Trust Act, but only upon payment by the Buckeye Company to the Trustee for the rights to be thus relinquished (Rec., pp. 62-72).

Upon the argument the Government frankly stated it was because of the Reading decision that its petition had been filed, and that it would be perfectly satisfied to have the petition dismissed if the Court was of the opinion either that the holding was not in violation of the Sherman Act or was of such minor importance that it might be disregarded (Rec., p. 114).

Thereafter the Court handed down its opinion in which it called attention to the fact that it had approved the sale of the stock to Jones with full knowledge of the situation then complained of, and presumably without its occurring to the Court or to the Government's counsel that the same created a substantial interference with the free competition aimed at by the original decree. It also called attention to the fact that this was a proceeding in equity, and that it was manifestly inequitable that either Jones or the Buckeye Company should escape liability for a situation assumed by them, and which was then recognized as of binding force and effect, and whose assumption seemed fairly to be a part of the consideration paid by Jones for the Buckeye stock. It held therefore that the Buckeye Company could not be heard to complain in the premises and the petition was dismissed. It called attention to the fact that the Government admitted that the *Reading* case, decided six years after the

consummation of the transaction complained of, had impelled its action and found that by reason of the circumstances the interference with free competition was reduced to a minimum. The Court further said that this appeared particularly in view of the agreement of The Hocking Valley Company that its property might first be resorted to to satisfy the mortgage debt. The Court therefore dismissed the petition without prejudice to the Government to renew the same when, if ever, the situation might be thought to justify it (Rec., pp. 109-115).

Alleged Lack of Authorization of two-cent Royalty.

The appellants in their brief on pages 19 and 29-31 advance the argument that there was no due authority for the insertion of the two-cent royalty clause in the mortgage, and that the same is objectionable as giving the Railway an interest in the coal lands in violation of the Sherman act.

With respect to the alleged lack of authorization it seems clear that even if such lack existed, subsequent ratification and adoption of such clause by the Buckeye Coal Company validated the same. Moreover, the argument of lack of authorization is not open to the Buckeye Company in this proceeding, wherein the Buckeye Company must appear not to protect its private interests, but solely to protect the public interest.

As stated by the Court (Rec., p. 114):

> "In the situation presented, we think the petitioning coal companies cannot be heard to say that payment of the royalty, or the continuance of the mortgage lien upon the lands of the Buckeye Company, would violate the law.

With respect to the contention that the two-cent royalty constitutes an injury to the public because of violation of the Sherman act, such contention is adequately

answered in the language of the Court (Rec., pp. 114-115):

> "Whatever theoretically potential interference with free competition might otherwise be created by the railroad-mortgage lien upon the Buckeye lands in connection with the royalty tonnage provision, we think such interference practically reduced to a minimum by the fact that by the contract between Jones and the railway companies, the railway property must first be exhausted before resort can be had to the coal lands, in connection with the fact that no suggestion is made that the railroad property is not entirely adequate to meet the payment of the mortgage in full, and the payment of the mortgage puts an end to the royalty. Indeed, an affirmative inference more or less strong in favor of the adequacy of the railroad security seems fairly deducible from the record presented to us. We therefore think that it will be time enough to question the invalidity of the situation we are discussing when, if ever, it becomes acute."

V.

The order of the Court below should be affirmed.

Respectfully submitted,

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